No. 2369

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

MEIER & FRANK COMPANY, a Corporation,

Appellant,

vs.

R. L. SABIN, as Trustee in Bankruptcy of Italian Restaurant Co., a Corporation,

Appellee.

Appeal from the District Court of the United States for the District of Oregon.

TRANSCRIPT OF RECORD.

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Names and Addresses of Attorneys upon this Appeal:

For Appellant:

Joseph & Haney, Corbett Bldg., Portland, Oregon

For Appellee:

Sidney Teiser, Portland, Oregon

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In the District Court of the United States for the District of Oregon.

Be it remembered, that on the 22 day of September, 1913, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Bill of Complaint, in words and figures as follows, to wit:

[Amended Bill of Complaint.]

"In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy of the Estate of Italian Restaurant Company, a corporation,
Plaintiff,

vs.

MEIER & FRANK COMPANY, a corporation,
Defendant.

To Hon. Chas. E. Wolverton and Hon. R. S. Bean, Judges of the District Court of the United States for the District of Oregon:

R. L. Sabin, Trustee of the estate of Italian Restaurant Company, a corporation, brings this his amended bill of complaint against Meier & Frank Company, a corporation, and complains and says:

I.

That at all the times hereinafter mentioned said Meier & Frank Company, a corporation, was, ever since has been, and now is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon.

II.

That heretofore, to wit, on the 19th day of May, 1913, a petition in involuntary bankruptcy was filed in this court against the Italian Restaurant Company, a corporation, and that the said Italian Restaurant Company, a corporation, was thereafter duly adjudged a bankrupt.

III.

That thereafter an order of reference was duly made by this court referring the said matter of Italian Restaurant Company, a corporation, bankrupt, to Chester G. Murphy, a Referee in Bankruptcy of this District, residing in the City of Portland, for the proper administration of said cause as provided and required under the act of July 1, 1898, 30 Stat. at L. 544, as amended, commonly known as the Bankruptcy Act of 1898 as amended.

IV.

That the first meeting of creditors for the examination of the bankrupt was duly called by said Referee and duly held on the 24th day of June, 1913, and that upon said date plaintiff, R. L. Sabin, was duly elected Trustee of said estate.

V.

That plaintiff, R. L. Sabin, duly qualified as Trustee of said estate in bankruptcy by filing the required bond, which bond was duly approved and ordered filed, and has ever since acted and is now acting as Trustee of said estate in bankruptcy.

VI.

That amongst the claims and petitions filed with the Referee in said cause was a petition and claim of Meier & Frank Company, a corporation, praying for the recovery of certain property hereinafter set forth in paragraph VIII hereof. That your Trustee resisted, and objected to the allowance of the claim and petition of said Meier & Frank Company, a corporation; that a hearing was duly had thereon before the Referee and testimony adduced by and on behalf of said Meier & Frank Company, a corporation, in support of said claim and petition. That the Referee decided and held against the validity of said claim and petition of said Meier & Frank Company, a corporation, and ordered said property to be held as the property of the estate by the Trustee, and that the claim to said property as to said Meier & Frank Company, a corporation, is res adjudicata.

VII.

That at the first meeting of creditors of said estate plaintiff herein as Trustee was authorized and empowered and directed to sell the property of said bankrupt coming into his hands, and pursuant to said authority he has offered the property of the said estate for sale. That amongst said property offered for sale by said Trustee is the said property heretofore claimed by said Meier & Frank Company, a corporation, as set forth in Paragraph VI. That the highest bid for said property so claimed as aforesaid by said Meier & Frank Company, a corporation, was the bid

of J. T. Wilson for $..... That your Trustee has accepted said bid of J. T. Wilson for said property, subject to the approval of the Referee, believing the same to be a fair bid for said property. That the Referee has approved said sale and that the property is ready to be turned over to the said J. T. Wilson upon the payment of the price bid therefor by him.

VIII.

Notwithstanding the determination of the question as to the ownership of said property by the Referee in Bankruptcy as hereinbefore set forth, the defendant herein ,Meier & Frank Company, a corporation, instituted an action in the Circuit Court of the State of Oregon for the County of Multnomah, on the 11th day of September, 1913, against said J. T. Wilson, for the recovery of the following property, claiming the same as belonging to it, the said Meier & Frank Company, a corporation:

433½	yards carpet
3	bales lining
16	yards padding
5	rugs
24¼	yards linoleum
1	sweeper
1	settee
4	rockers
152	chairs
14	tables
132	table tops

104 table cloths
17 table pads
20 doz. knives
2 steak knives
3 pr. carvers
20 doz. forks
2 oyster forks
1 doz. table spoons
20 doz. tea spoons
10 doz. desert spoons
55 doz. napkins
1 sugar bowl
6 meat covers
9 soup tureens
8 coffee pots
6 Venetian shades
8 V shades & over drapes
1 over drape
7′ brass pole
2 pr. sockets
2½ doz. rings
2 pr. portiers
17 1-3 yds. velous
1 pr. curtains valance
3 cushions
20 S. pads
1 cabinet
½ doz. C. sacks
12 doz. towels
4 combs

1 door mat
10 yds. canvas

IX.

That in addition to bringing the suit aforesaid, the said Meier & Frank Company, a corporation, has made open and public demand for said property, and has threatened publicly and openly to enter suit against any party to whom the Trustee may transfer said property, or any party who may come into possession of the same.

X.

That said action instituted by said Meier & Frank Company, a corporation, against J. T. Wilson, in the Circuit Court of the State of Oregon for the County of Multnomah, and said threats to bring such further action against such persons as may come into possession of the said property from the Trustee by conveyance or otherwise, has had the effect of depreciating the value of the property of said estate in bankruptcy, and has created a cloud upon the title thereto and causes the Trustee to be hampered and harrassed in his endeavor to dispose of the property for its fair value, and said Trustee cannot now because of said action and threats of said defendant obtain a fair price for said property.

XI.

That although the Trustee is ready to consummate the said sale to the said J. T. Wilson by delivery of the property to him, the said J. T. Wilson refuses to receive the property unless he can obtain the same

free of any litigation or claim thereto which will be litigated against him, unless the Trustee guarantees and warrants the title to the same.

XII.

In order to sell the said property at a reasonable price, that said action and threats of said Meier & Frank Company, a corporation, will either cause the Trustee to warrant the title to said property, which said Trustee refuses to do for the reasons that are apparent, or cause the said Trustee to enter suit against the said J. T. Wilson for specific performance of the contract or for the purchase price thereof, which proceeding would be costly to the estate and which your Trustee does not believe would be equitable on the part of said Trustee since the said J. T. Wilson bid upon the said property without knowledge of the fact that there was any cloud thereon, or that he would have to take the same and litigate title thereto, and especially as he bid upon the same for the purpose of obtaining immediate possession thereof for the purpose of conducting an immediate sale of the same.

XIII.

That efforts have been made to sell the said property to others but the Trustee has not been successful in obtaining a fair price for said property subject to the present conditions.

WHEREFORE, plaintiff prays that this Honorable Court may determine the rights of the Trustee in said property and remove the cloud from the said

title, and that the said Meier & Frank Company, a corporation, its agents, employees, and attorneys, be enjoined and restrained from further prosecuting said action instituted by it against said J. T. Wilson; that T. M. Word, Sheriff of the County of Multnomah, be enjoined and restrained from levying upon the said property or in any way interfering with the same, and that he be required and ordered to release the said property if he has already levied upon th same; that the said Meier & Frank Company, a corporation, its agents, employees, and attorneys, be further enjoined and restrained from instituting any further suits or actions whatsoever for the recovery of said property; that the said Trustee be awarded his reasonable cost and disbursements in this behalf expended, together with a reasonable attorney's fee on behalf of his attorney, and for such other and further relief as to equity may be meet, and to this court expedient.

R. L. SABIN,
Plaintiff.

SIDNEY TEISER,
Attorney for Plaintiff.

[Endorsed]: Amended Complaint in Equity. Filed Sep. 22, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 30 day of September, 1913, there was duly filed in said Court, an Answer, in words and figures as follows, to wit:

[Answer to Amended Complaint.]

In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy of the Estate of Italian Restaurant Company, a corporation,
Plaintiff,

vs.

MEIER & FRANK COMPANY, a corporation,
Defendant.

Comes now the defendant in the above entitled suit, and answering the amended complaint filed herein, respectfully shows and alleges as follows:

I.

Defendant admits the truth of Paragraphs I, II, III, IV and V of said amended complaint.

II.

Answering Paragraph VI of said amended complaint, this defendant denies that amongst the claims and petitions filed with the Referee in said cause was a petition and claim of defendant praying for the recovery of certain property mentioned in Paragraph VIII of said amended complaint, or that said defendant filed with said Referee any claim or petition whatsoever relative to said property; and, further denies that said Trustee resisted or objected to the allowance of any claim or petition of said defendant, for the reason, among others, that none was filed with said Referee or Trustee; and, denies that a hearing was duly or at all had herein before said Referee, or

that testimony was taken on any claim or petition so filed on behalf of said defendant in support of or relation to any claim or petition of defendant; and further denies that said Referee decided or held against the validity of said claim or any claim or petition of said defendant, or ordered said property to be held as the property of the Estate by the Trustee, or that the claim to said property by defendant is or ever was adjudicated as between the plaintiff herein and defendant, or is as to any matter or claim relative thereto res adjudicata.

III.

Answering Paragraph VII of said amended complaint, this defendant denies any knowledge or information sufficient to form a belief as to the truth or falsity of the matters and things therein set forth, excepting that this defendant has been informed that the sale of said property mentioned in Paragraph VII was made to said J. T. Wilson and that said sale had been confirmed.

IV.

Answering Paragraph VIII of said amended complaint, this defendant denies that notwithstanding the determination of the question as to the ownership of said property by said Referee, as set forth in the amended complaint, the defendant herein instituted the action mentioned in said paragraph, but this defendant avers that an action was commenced in its name, but that the same was not commenced after any hearing before said Referee or before any Court

as to the rights of the parties hereto in and to said property described in said Paragraph VIII.

V.

The defendant admits the truth of Paragraph IX of said amended complaint.

VI.

Defendant denies each and every allegation contained in Paragraph X of said amended complaint, and avers that said property has been sold to said Wilson by said Trustee and said sale thereof confirmed, and that said Wilson is legally bound to pay said Trustee therefor.

VII.

Answering Paragraphs XI, XII and XIII of said amended complaint, this defendant denies any knowledge or information sufficient to form a belief as to the truth or falsity of any of the matters and things therein set forth.

WHEREFORE, this defendant having fully answered the amended complaint herein, prays that this proceeding may be dismissed, and for judgment against the plaintiff herein for the costs and disbursements incurred by this plaintiff, and for such other and further relief as to the Court may seem just and equitable.

JOSEPH & HANEY,
Attorneys for defendant.

[Endorsed]: Answer to Amended Complaint. Filed Sep. 30, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 11 day of October, 1913, there was duly filed in said Court, a Decree, in words and figures as follows, to wit:

[Decree.]

In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy of the Estate of Italian Restaurant Company, a corporation,
Plaintiff,

vs.

MEIER & FRANK COMPANY, a corporation,
Defendant.

Before Hon. CHAS. E. WOLVERTON, Judge of the District Court of the United States for the District of Oregon, this 6th day of October, 1913:

This cause coming on this day to be heard upon the Amended Complaint in Equity of R. L. Sabin, Trustee in Bankruptcy of the Estate of Italian Restaurant Company, a corporation, Plaintiff, and the Answer of Meier & Frank Company, a corporation, Defendant, and upon the testimony and evidence adduced at the trial thereof by both Plaintiff and Defendant, and upon argument of counsel, and it appearing that the Defendant by reason of its action in the State Court and of its threats to enter further action to recover the property set forth in said Amended Complaint against any person to whom the Trustee may convey the same, has created a cloud upon the title to the said property, and it further appearing that the Trus-

tee's title to said property is good and valid, and the attempted claim by said Defendant by reason of its conditional bill of sale upon the said property is not good, and that the said bill of sale is of no effect as against said property, and it further appearing that the said Meier & Frank Company, a corporation, has no claim whatsoever against the said property,

IT IS ORDERED AND DECREED

that the property set forth in said Amended Complaint be, and the same is hereby declared to be the property of the Plaintiff as Trustee in Bankruptcy of the Estate of Italian Restaurant Company, a corporation, and the said Defendant, Meier & Frank Company, a corporation, its agents, employees, and attorneys, be, and they hereby are enjoined and restrained from bringing any suits or actions to recover the said property, or in any way making any threats or claim to the same whatsoever.

AND IT IS FURTHER ORDERED AND DECREED

that the said Trustee be awarded his reasonable cost and disbursements in this behalf expended, taxed at $51.92.

R. S. BEAN,
Judge.

Dated at Portland, Oregon, this 11th day of October, 1913.

[Endorsed]: Decree. Filed Oct. 11, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 22 day of November, 1913, there was duly filed in said Court, a Stipulation, in words and figures as follows, to wit:

[Stipulation as to Statement of Evidence.]

In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy of the Estate of Italian Restaurant Company, a corporation,

Plaintiff,

vs.

MEIER & FRANK COMPANY, a corporation,

Defendant.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto, that the testimony, as the same was adduced at the trial of this cause, and the decision or opinion of the Judge, transcribed by the stenographer, shall be printed verbatim, identically in the same manner as it was taken, and shall stand as the statement of the facts in this cause on appeal.

SIDNEY TEISER,
Attorney for plaintiff.
JOSEPH & HANEY,
Attorneys for defendant.

[Endorsed]: Stipulation. Filed Nov. 22, 1913.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 22 day of November, 1913, there was duly filed in said Court, an Order, in words and figures as follows, to wit:

[Order Settling Statement of Evidence.]

In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy of the Estate of Italian Restaurant Company, a corporation,
Plaintiff,

vs.

MEIER & FRANK COMPANY, a corporation,
Defendant.

Upon reading and filing the stipulation, annexed hereto, and upon motion of the attorneys for the defendant herein,

IT IS HEREBY ORDERED that the testimony, as the same was adduced at the trial of this cause, and the decision or opinion of the Court stenographer, shall be printed verbatim, identically in the same manner as it was taken, and shall stand as the statement of the facts in this cause on appeal.

R. S. BEAN,
Judge.

Dated November 21, 1913.

[Endorsed]: Order. Filed Nov. 22, 1913.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 18 day of October, 1913, there was duly filed in said Court, Evidence in words and figures as follows, to wit:

[Evidence.]

"In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy of the Estate of Italian Restaurant Company, a corporation,
Plaintiff,

v.

MEIER & FRANK COMPANY, a corporation,
Defendant.

CHESTER G. MURPHY, called as a witness on behalf of the trustee, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. TEISER:

Mr. Murphy, you are the referee in bankruptcy for this district?

A. For this county, yes.

Q. And I believe you were the referee to whom the Italian Restaurant Company matter was referred in bankruptcy?

A. Yes, sir.

Q. That is admitted in the pleadings. Do you recall any controversy arising as to a claim of Meier & Frank to certain property held by the trustee in this particular matter, on or about July 14th of this year?

A. Yes.

Q. I will hand you this affidavit, and ask whether you made that affidavit in this proceeding.

A. Yes.

Q. Is the fact set forth in that affidavit true. Mr. Murphy?

A. The facts, in my recollection, are that, in the course of administration of this estate, there was a claim presented, or notice reached me that Meier & Frank claimed a portion of the fixtures over there under some kind of a contract, and some one was in to see me about it, and I know that the trustee's attorney, Mr. Teiser, had the matter up with me, and I suggested they have a hearing on it so they could arrive at the facts, in order that the administration of the estate might be expedited. It was upon my suggestion that we had a hearing, and Mr. Teiser and Mr. Haney—I think it was Mr. Joseph appeared; in fact, I know it was Mr. Joseph that appeared, with Mr. Kiernan, on behalf of the claim of Meier & Frank. There were numerous other creditors present, and several attorneys, and upon taking the matter up either I called attention to the fact, or attention was called to the fact that there was no reclamation petition. The trustee was in possession of the personal property, and there was no petition by the creditors for reclamation. So on discussion between Mr. Joseph and Mr. Haney—between Mr. Joseph and Mr. Teiser, I asked Mr. Joseph if they made claim to this. He said "We certainly do." And I said there was no claim filed, and to my very best recollection, and it is very clear in my mind, why, they agreed that the claim would be—I mean, the petition would be treated

as filed, and go ahead and take testimony in support of the claim. The testimony of Mr. Kiernan was given, and they discussed the facts, and the exhibits were examined, and I made the ruling that, in my opinion, title had passed, and that there was no conditional contract of sale out against this property, and directed the trustee to sell it. And a few days later Mr. Teiser came in to see me about the matters in this estate; and whether he was there then or not—but I called up Mr. Joseph, and asked him if they would want to take a review in that matter, because the record was not clearly made up, and if he wanted to take a review I wanted to give him plenty of time, to ask for a review—I wanted to give him plenty of time; and if not, direct the trustee to go and sell it, because I wanted to adjust the affairs. And he said they were going to take no review; that they were going to wait until it was sold, and then follow it in the hands of the purchaser. So then I said, "I will go ahead and request the trustee to sell it." That is my recollection of everything I know about the Meier & Frank account.

Q. When you ruled upon this question as to the right of Meier & Frank to this particular property, was it done with the idea and understanding in your mind that a claim had been filed by Meier & Frank for it?

A. I treated it—I understood that it was understood the claim was filed, and they were submitting the matter, and the claim would come in later. But

that ruling was adverse. They made no claim, and I called up Mr. Joseph about it. And he said they would do nothing further, and follow the goods in the hands of the purchaser.

Examination by the Court.

Q. Did you make the ruling as though the claim was there?

A. Yes, sir.

Q. That was the understanding, that you should adjudicate the matter there?

A. Yes. That was what they were there for, with their papers and exhibits, and they should come in and have a hearing on this claim. I didn't like to go ahead and proceed with it, because there was no reclamation petition.

Direct examination continued.

Q. Do you recall whether you called the stenographer to take down the testimony, or who called her?

A. I don't recall, Mr. Teiser.

Q. All right.

A. I don't recall that it was reported.

Q. Yes, it was reported.

Cross Examination.

Questions by Mr. HANEY:

The creditors had been there on another matter, had they not, Mr. Murphy?

A. There were a number of creditors there, Mr.

Haney, and whether it was just a meeting of creditors and Mr. Joseph had been notified, or whether this came up as a special meeting, I can't recall. My record will show.

Q. As a matter of fact, Mr. Kiernan and Mr. Joseph left, leaving you and the other creditors on this other matter, after this was all over, did they not?

A. I think other matters were discussed and passed on.

Q. Yes, the meeting of the creditors was not called for this purpose?

A. I would have to look at the record. There was no written notice sent.

Q. Do you know how Mr. Joseph came down—whether he was telephoned to from your office to come down?

A. I don't recall. I talked to Mr. Joseph several times.

Q. Before this?

A. I think we had some before—some 'phone conversation.

Q. Did you know before this time there was no claim filed? Did you know prior to this meeting that the Meier & Frank Company had filed no claim?

A. Oh, yes, I knew there had been no claim filed.

Q. Had you asked them prior to this time if they were going to file a claim?

A. Yes.

Q. And as a matter of fact, either you or some one from your office telephoned to him for some one to

come down there to that meeting, did they not?

A. I don't know about that, Mr. Haney.

Q. When he came there, who was with him? Who came with him?

A. I don't remember. Probably there were ten or twelve men in the office, when I came in, he was either in the office then or came in when I was having the papers before me on my desk.

Q. You don't know whether Mr. Kiernan came down with him or not, do you?

A. No, I don't.

Q. At that time he started to tell you the claim of the Meier & Frank Company, the position they were taking in the matter, did he not?

A. I think it came up, Mr. Haney, as I stated, that I asked him if they claimed those goods.

Q. Yes.

A. And then the question next came—he said they certainly did, and they had Mr. Kiernan there with the original records.

Q. Did you ask him then if he had filed a claim?

A. I told him there was no claim filed here, no petition in reclamation.

Q. Then is when you say you understood him to say he would file a claim?

A. My recollection is that he stated we would treat it as filed, by agreement with Mr. Teiser, and later file it, and go ahead and take the testimony on it.

Q. When did Mr. Teiser make up this record—at that time—was that before or after Mr. Kierman had

taken the stand?

A. Oh, we went right ahead with that at that time, I think, Mr. Haney.

Q. At that time, do you remember whether or not you in any manner assisted in making up the record by correcting anything that Mr. Teiser may have said to the reporter?

A. No, I don't. I haven't seen the testimony, and I don't know what questions I asked. I wanted to be informed myself on it.

Q. Do you recall whether or not Mr. Joseph insisted that this be treated as an informal proceeding before you?

A. No, I don't recall it.

Q. Didn't he tell you, as a matter of fact, that they hadn't filed a claim and didn't intend to file a claim?

A. Not to my recollection, no, sir.

Q. Didn't he tell you that he had come there merely to acquaint you with Meier & Frank's position in this matter?

A. Well, my recollection is that he came there to get an order on the trustee releasing this property and presenting the claim.

Q. Who was it asked Mr. Kiernan to testify, do you remember?

A. No, I don't.

Q. As a matter of fact, didn't you request him to testify?

A. I don't recall it. The testimony ought to show.

Q. Do you recall just what was said by Mr. Jos-

eph, about the time of his departure, concerning bringing an action to recover the property?

A. When he was leaving the office?

Q. Well, I presume it was about the time he was leaving.

A. They left in the midst of the meeting, I remember, Mr. Kiernan and Mr. Joseph, and stated they still claimed the property.

Q. What was said about bringing an action for the recovery of it?

A. I don't recollect.

Q. You don't remember of them saying anything about that?

A. No, I don't. It is some time ago, Mr. Haney, and, of course, it is not a personal matter with me, and it is a question of getting at the facts as to the sale of this merchandise.

Q. Do you recall that he told you that Meier & Frank didn't intend to file a claim in this matter, but would pursue the goods and attempt to recover them from anybody that got possession of them?

A. He told me that afterwards on the 'phone, when I wanted to be sure he had time to make what appearance he wanted to.

Q. That was not at the meeting?

A. Not to my recollection, no.

Q. Do you recall whether you told him that he should do that—go ahead and sue in any court he saw fit, at the meeting?

A. I don't recall that, no. I don't see why I

should.

Q. Just what claim did you pass upon there, Mr. Murphy?

A. I passed upon the question whether they were entitled by means of the reclamation petition to take these goods out.

Q. All of the goods?

A. All of the goods from Meier & Frank.

Q. Considered the claim as a whole, did you?

A. Yes.

Redirect Examination.

Q. Mr. Murphy, if Mr. Joseph had said to you at the time of this hearing, that he would not, or did not intend to file a claim, would you have heard the matter?

A. No.

(Excused.)

J. T. WILSON, called as a witness on behalf of the trustee, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. TEISER:

Mr. Wilson, did you agree to purchase from Mr. R. L. Sabin, trustee in bankruptcy of the estate of the Italian Restaurant Company, certain property which was made a claim by Meier & Frank as their property?

A. I did, yes.

Q. Do you know whether Mr. Sabin offered to deliver that to you?

A. What is that?

Q. Did Mr. Sabin offer to deliver that property to you?

A. Yes, he offered—he was going to deliver it to me.

Q. Did you accept delivery?

A. No, I hadn't accepted delivery. I was just about to accept delivery when there was action brought by Meier & Frank against me.

Q. Why didn't you accept delivery of the property?

A. Because I couldn't get the title. The title was in dispute.

Q. What was it your purpose to do with this property if you bought it?

A. I intended to have an auction sale right there on the place. By their stopping it, I don't suppose I should seek it now—it would reduce the price of the property, as far as I am concerned; I couldn't give as much for it.

Q. If some one brought suit and took that property, the property would be of no use to you, would it?

A. No, it wouldn't be of any use if they took the property away.

Cross Examination.

Questions by Mr. HANEY:

Have you the property now, Mr. Wilson?

A. No, I have not.

Q. You haven't taken it yet?

A. No.

Q. You bid upon it, however?

A. I bid on it, yes. My bid was accepted, but it was not handed over to me.

Q. Do you expect to pay the same amount?

A. Well, no, I don't know, because if I could have sold it on the place where it is—where it was, I had made arrangements to sell it. Now, if the action is brought, it is not worth as much to take, because it is worth more to auction it right there than to take it out. It is peculiar kind of property.

Q. You expect to bid again on it?

A. Yes, but I wouldn't bid near as much on it as I did before.

Redirect Examination.

Q. How much did you bid before, Mr. Wilson?

A. $750.

(Excused.)

O. S. CROCKER, called as a witness on behalf of the trustee, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. TEISER:

Mr. Crocker, what is your business?

A. I am adjuster for the Merchants Protective Association.

Q. Is Mr. R. L. Sabin connected with it?

A. Mr. R. L. Sabin is secretary of it.

Q. What connection did you have with the estate of the Italian Restaurant Company, if any?

A. I took charge of it for Mr. Sabin, and invoiced it. Also showed it to the parties wishing to buy it.

Q. Did you attempt to get any offers for the property?

A. Yes, I got quite a number of offers on different lines of goods there.

Q. Was the offer that you obtained on the property at which Mr. Wilson offered to purchase the highest offer that you could obtain?

A. Yes, that was the highest I have been able to.

Q. Did you make much of an effort?

A. I showed a great many people the stock at different times, yes.

Q. His was the highest offer?

A. His was the best offer, yes.

Q. Do you think you could get as good an offer for that property in the present state of the uncertainty of title? That is, you understand the situation of the property?

A. Yes. No, I don't think it could be sold under the circumstances, if the title was not clear.

Q. When you took charge of this property, how did you first ascertain that Meier & Frank had a claim upon the same, or made a claim upon the same?

A. Either Mr. Pearson or the cashier of the restaurant told me that there was a contract on that goods.

Q. And what did you do?

A. I went up to the office of Meier & Frank, and I believe there was a lady in charge there, who gave me a list of the goods. I wished to know which goods they were, so I could specify in my invoice what was claimed by Meier & Frank, or supposed to be claimed by Meier & Frank.

Q. Did you obtain a copy of the agreement from Meier & Frank?

A. Yes, they gave me a copy of their contract and also a list of the merchandise.

Q. I hand you this agreement and the invoices attached thereto, and ask you if they are the papers you received from Meier & Frank.

A. Yes, those are the papers that I got there.

Mr. TEISER: I would call for the original of this contract, Mr. Haney, if you will produce it.

Mr. HANEY: I think I have the original here. I am not sure. (Produces it.)

Mr. TEISER: I will introduce the copy along with the original.

Mr. HANEY: I would like to withdraw the original.

Marked "Trustee's Exhibit A."

(Excused.)

Mr. TEISER: I would like to introduce a copy of a letter written to Meier & Frank. It is admitted by Mr. Haney, I understand, that this is a copy and they received the letter.

Mr. HANEY: Yes. That is the copy that we introduced.

COURT: Very well. Let it be introduced.

Mr. TEISER: I will introduce it, your Honor, for the purpose of giving what is the fact.

Marked "Trustee's Exhibit B," and read as follows:

"Re:

Italian Restaurant Co. July 1, 1913.

Meier & Frank Co.

Portland, Oregon. Attention Credit Dept.

Gentlemen:

The Trustee has completed an inventory of the property of the Italian Restaurant Co., and amongst the property inventoried by him as belonging to the estate are various goods sold to the Italian Restaurant Co. by your firm.

I understand that these goods are claimed by you under a conditional contract, but as it is very questionable whether the property can be held under your conditional contract, the Trustee is claiming the property and taking possession of the goods as the property of the estate. If, however, you desire to maintain your claim to the goods, I would suggest that you make a demand for them before the Referee without delay, so that the ownership of the same may be settled.

I have endeavored to see Mr. Joseph, your Attorney, at the suggestion of Mr. Kiernan, but have been unable to get in touch with him. I am accordingly sending him a copy of this letter.

Yours truly,

Sidney Teiser,

T|C Atty. for Trustee.

c|c Mr. Joseph, Atty."

Mr. TEISER: I would like the privilege of resting, and after Mr. Joseph testifies on the morrow, placing Mr. Gebhardt on the stand.

Mr. HANEY: No objection.

W. E. Kiernan, called as a witness on behalf of the claimant, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. HANEY:

Your name is W. E. Kiernan?

A. Yes, sir.

Q. Where are you employed, Mr. Kiernan?

A. Credit man at Meier & Frank.

Q. Were you acting as credit man at Meier & Frank's during the months of, say, well, June and July?

A. Yes, sir. The last three years.

Q. You have been there for three years past?

A. Yes.

Q. I will ask you if you recall the incidents leading up to a meeting at Mr. Murphy's office about the 14th of July last?

A. Yes, sir.

Q. In which the Italian Restaurant Company was involved?

A. Yes, sir.

Q. Prior to going to that meeting, had you had a talk with anybody representing the Merchants' Protective Association, or Mr. Sabin?

A. Mr. Teiser.

Q. About how long before the meeting at Murphy's office did that conversation occur?

A. I should think it would be about three weeks—two or three weeks.

Q. Do you recall receiving the original of that letter that is referred to?

A. Yes, sir.

Q. Did you have a talk with Mr. Teiser shortly after, or about the time of the receipt of that letter?

A. Well, it was round about that time. It was before that time really.

Q. What was that conversation? What did he say and what did you say?

A. Mr. Teiser wanted duplicate bills and a copy of the contract, which we gave him, and he and I went into a discussion regarding the whole transaction.

Q. What was said about Meier & Frank's rights in that matter?

A. Well, I will explain that over in our office we prepare all claims of bankruptcy—

Q. Who prepares all claims of bankruptcy?

A. I personally do.

Q. You personally prepare all Meier & Frank's bankruptcy claims?

A. Yes.

Q. Go ahead.

A. When this matter came up, I called up Mr. Joseph, and told him that the letter had been received, and he says, "Well, that is all right. Don't pay any attention to that." And then on the morning of this

day down in Mr. Murphy's office he 'phoned me, and said there was going to be an informal meeting down in Mr. Murphy's office, and he wanted me to bring a copy of the contract and also the ledger cards.

Q. The ledger accounts at Meier & Frank's are kept by card index, are they not?

A. Yes.

Q. Each one stands separate?

A. Yes.

Q. Go ahead and tell just what happened at Murphy's office.

A. Do you want to hear the whole transaction, your Honor?

Q. Yes.

A. Shortly before this contract was entered into, Mr. Everett and Mr. Pearson, representing the Italian Restaurant, came to our credit department to make arrangements regarding credit. Of course, it was a corporation. I had very little faith in the enterprise myself—I didn't think it would be a paying proposition. However, we went into a contract, by which they paid us—this was the contract here. At that time they wanted to buy merchandise. I forget what department it was. I can see here they wanted to get some furniture, and they also desired to have us take over the frescoing of the apartment or room. The frescoing cost something like $600—$650, that was it. It was done by some outside people. They were to charge that to Meier & Frank, and we were to pay them. They paid us $750 cash on that day.

Of course, we would have to pay the contractor $650, which would make $100 money received for $412.50 worth of merchandise. Later they came in—at that time they were going to distribute the buying around the city, the purchase of the other material, but they changed their minds then, and bought furniture from us, and crockery, and as they were bringing the sales checks up I had a good deal of telephoning to do with Mr. Pearson about this, and on one occasion left my office and went down to his place of business, and told him that they would have to make larger payments. Our regular contracts—we have three thousand of these contracts, and they are generally one-third or one-fourth down and the balance monthly payments. On this occasion we were holding $1041 worth of charges. And Mr. Pearson then paid $450 more, and we continued until the entire contract—every time they bought something and added to this contract, they added merchandise to this contract, we added payments to the contract. I may state that we have something like three thousand contracts. I think that propably 2900 of those are done in the same way. Other firms which I know, their contracts are made out—for instance, you might come into our place, and say "We desire $500—$600 worth of furniture, and we desire to pay $150 down." And then in going through the store furnishing up a house, it frequently runs as high as seven or eight hundred dollars. That is where our trouble comes. They get into us. Because in our business we are not able to

keep sale-checks together, and they are apt to go over —never under. Therefore our terms sometimes are too small for the amount of merchandise purchased.

Q. What was the agreement about all of the furniture and crockery that was sold by Meier & Frank?

A. It was all to be sold under a contract; that was, the title was to be in Meier & Frank.

Q. The title was to be in Meier & Frank until the full amount was paid off?

A. Yes. We also opened an open account with them, that is, for merchandise sold where we didn't claim title to it.

Q. That is a separate account from this?

A. That is a separate account from this; not this account here. It is a different number—5129. This is a lease, as you will see, your Honor, it has an "L" in front of it, with another number, being two different accounts—two different parts of our ledger.

Q. That open account, you make no claim for the ownership of any of the property sold under it?

A. No. In that respect, we are like the other creditors.

Q. Who else did you deal with representing the restaurant company except Mr. Pearson?

A. I talked to Mr. Everett—C. V. Everett, and I talked to Mr. Pearson, was the only ones I talked to—Mr. Everett, Everett and Pearson were the prime movers in it. And Montrezza signed this for me, the secretary. I went to their office and had it signed up.

Q. There has been something said about what

Schedule "A" was, referred to in this contract.

A. They are the itemized bills of the purchases. They are taken directly from the sales-checks.

Q. At the time that contract was signed, I mean, at the identical date the signatures were affixed, was there any Schedule "A" there at all?

A. There was not.

Q. Was there anything affixed to it marked "A"?

A. There was not. There never was on the three thousand contracts we have, it has never been done. It is impossible to do it.

Q. But the agreement was that all of the goods purchased, as furniture and crockery, by the Italian Restaurant Company, was to be under a lease contract?

A. Absolutely.

Q. Otherwise, would you have given them that much credit?

A. We wouldn't have given them any credit.

Q. Did they have anything to give them credit on?

A. They didn't have anything to give them credit on. As a matter of fact, their credit having been without taking title to the property, it was so perishable, the nature of it, that I insisted upon Mr. Pearson guaranteeing the payment of it, and also Mr. Everett, personally. Aside from being officers of the company, they had to sign it personally.

Q. That was because it was crockery, which was perishable stuff?

A. In opening an account, I put the limit on it of

$100. The reason I put it as high as $100 is that I sold them merchandise on this contract, and I didn't feel like holding them down to any less than $100.

Examination by the Court.

Q. I understand you have this contract and also an open account?

A. Open account.

Q. Also the personal guarantee of those other people?

A. Yes, sir.

Q. On that account?

A. Yes, sir. Mr. Pearson didn't understand the signing of a contract. He said he never had signed one. He was very reluctant about signing it. I said we couldn't go into it, absolutely wouldn't go into it unless we could keep the title. They were very anxious. I told them as long as we kept the title in our name, that the probabilities are that following around six or seven months we would break even.

Direct examination continued.

Q. I will ask you, Mr. Kiernan, whether any of the other creditors knew that this property was held down there under a lease-contract by the Restaurant Company?

A. Every credit man in the city of Portland selling them must have known that, because different mercantile agencies knew it. That is, several creditors called us up—for instance, several of the stores around town called us up, and asked us about our

dealings with them. Of course, they knew we were putting the goods in there. They wanted to know how we were selling them. We told them all under contract.

Q. I will ask you to detail to the court what happened, to the best of your recollection, at Mr. Murphy's office, at the meeting on July 14th.

A. Mr. Joseph 'phoned me, and told me to bring the Italian Restaurant contract and our ledger cards over, as there was to be an informal meeting before Mr. Murphy. The reason of the holding of the said informal meeting—I asked him what was the nature of it, what they intended to do about it. He had told me what he intended to do about it, and—of course, it is immaterial what he said, but he said he thought they were not treating him just right. And he said to let them go ahead, that he would follow that property wherever it went, and he wasn't going to file any claim down there, or file any claim with the referee in bankruptcy, as he thought our position was so plain that he didn't want to do it. And at the time Mr. Teiser sent for a stenographer—

Q. Was that after you and Mr. Joseph got there?

A. Yes.

Q. There was no stenographer there when you got there?

A. She might have been in a different room.

Q. Go ahead.

A. But he dictated—I don't know what the legal name is, but the standing of it, what it was for. Mr.

Joseph objected to it, and it was changed—told him it was informal, it was understood it was informal. There was a meeting there. Mr. Everett was there to be asked certain questions by the trustee, and they took it up after we left.

Q. What was said about Meier & Frank filing a claim, if anything, to the best of your recollection?

A. Well, it was understood in my mind positively that we were not to file a claim.

Q. What was said by anybody about it?

A. Mr. Joseph said at that time we would not file a claim, did not propose to file a claim.

Q. Did Mr. Murphy ask him if he had filed a claim?

A. Yes, he told him—Mr. Murphy—he hadn't filed a claim, didn't propose to, there was no need of it. Because we talked that matter over going over. I knew Mr. Joseph's thoughts in the matter, what he intended.

Q. What was said, if anything, about the remedy that Meier & Frank might attempt to invoke here?

A. Just before we left, Mr. Teiser said, "Well, Mr. Joseph, I presume"—I don't know whether he said presume, but anyway, "If you replevin it, you will replevin in the United States Court," said Mr. Teiser. Said Mr. Joseph, "I don't know what court I will replevin in. I don't intend to replevin it until it is sold."

Q. Do you recall any conversation between Mr. Murphy and Mr. Joseph to the effect that Mr. Joseph agreed to consider the claim as filed, and take testi-

mony on that basis?

A. I know positively that was not agreed to, because it was not according to Mr. Joseph's thoughts. He had told me what he intended to do. Coming up he had told me what he intended to do.

Q. Who?

A. Mr. Joseph outlined his plan, what he intended to do. If I may tell it all, he said he thought these fellows were horsing us around a little bit, and he said he didn't intend to let them.

Q. Who asked you to take the stand and be sworn down there—Mr. Joseph?

A. Mr. Murphy.

Q. Mr. Murphy did?

A. Yes.

Cross Examination.

Questions by Mr. TEISER:

Mr. Kiernan, you say that at the meeting before Mr. Murphy I started to dictate a statement?

A. Yes.

Q. Do you recall the effect of what I started to dictate?

A. Well, I know you started to do something. Mr. Joseph immediately corrected you, and said this was not a formal hearing.

Q. I started to dictate something?

A. Yes.

Q. So as to make it appear it was a formal hearing?

A. I won't say as to that; but I presume it must have been; otherwise, he would not have objected.

Q. Did the stenographer start to take it down when I started to dictate?

A. Yes.

Q. Did I get very far in the dictating?

A. Not very far, not when he stopped you.

Q. Mr. Joseph stopped me?

A. Yes.

Q. And the stenographer scratched it out, I suppose?

A. I don't know what she did.

Q. She wrote it down while I was dictating, did she?

A. I don't know about that.

Q. Do you think I would have started dictating something and the stenographer not started writing it down?

A. You ask me if she started doing it?

Q. Yes.

A. Yes, she started doing it, I presume, because it was done so fast, you see. How far she had got along in the course of her dictation, I don't know.

Q. What do you think the purport of what I had started to dictate was?

A. Well, I think you was trying to get it that it was a formal meeting before the referee in bankruptcy, something that Mr. Joseph was particularly determined you shouldn't.

Q. Well, now, when you came down to Mr. Mur-

phy's office, you say he 'phoned you to bring the—

A. Ledger cards and the contract.

Q. Did you bring the contract?

A. Yes, sir.

Q. Did you present it to him?

COURT: Did Mr. Murphy do that, or Mr. Joseph?

A. Mr. Joseph.

Q. Did Mr. Joseph bring the contract?

A. Yes, sir.

Q. Did he present it to Mr. Murphy?

A. Yes, sir.

Q. It was there?

A. Yes, sir, it was there. That is, I think it was there. Wasn't it there, Mr. Teiser?

COURT: How much is due on the account now?

A. $1648.46. Yes, I know the contract was there. The original, I think, was there. There is no question about it.

Q. Well, now, it is stated in the testimony, in the transcript of the testimony taken by the stenographer, the question is asked, "Have you a copy of the agreement which was entered into at that time?"

A. Yes.

Q. You answered, "I have the original"?

A. Yes.

Q. "Q. The original? All right, just offer that in evidence."

A. Yes.

Q. "Thereupon original Conditional Sales agree-

ment was offered in evidence and for identification marked "Creditors' Exhibit A." Is that correct?

A. Yes, sir.

Q. You filed the original in evidence, and it was marked "Creditors' Exhibit A"?

A. No, I won't say that I filed it.

Q. Well, it was filed?

A. Well, they took it from my hand, yes.

Q. How did it get back in your possession?

A. Mr. Murphy filed it. Is the original there? You will find on the back of it Mr. Murphy's writing.

Q. That is Mr. Murphy's writing, is it?

A. Yes, sir.

Mr. TEISER: I call attention to that, your Honor. "Creditors' Exhibt A" in Mr. Murphy's handwriting.

A. You see this has been left at Meier & Frank's all the time since.

Q. This portion of the paper that is pasted on there was not there at the time, was it?

A. Which portion of the paper?

Q. These statements?

A. Yes, all that.

Q. That was there all the time?

A. Yes.

Q. Are you quite positive about that?

A. Oh, there is no question about that.

Q. That this whole thing was there?

A. There is no question about it.

Q. Why would you think Mr. Murphy would write "Creditors' Exhibit' there in that condition?

A. Well, I don't know why he would do that. But there isn't a bit of question. There, that is my writing, don't you see that figure there. And I was very particular to see that, because this is the original, don't you see, and your copy was made from this.

Q. Now, as a matter of fact, Mr. Kiernan, wasn't that original contract filed with the papers in Mr. Murphy's office?

A. That?

Q. Yes.

A. No.

Q. It remained still in your possession?

A. Yes. Mr. Murphy gave it back to me after the stenographer had marked it; he gave it right back to me. Never intended to be filed, because, as I say, it is one of our agreements. I couldn't very well leave it there.

Q. Now, you stated, Mr. Kiernan, that when this contract was entered into—well, let's get a little further about the meeting at Mr. Murphy's office. You said I came up to see you prior to that meeting to get a copy of the contract?

A. Yes.

Q. Do you remember who was with me?

A. There was some man with you, yes.

Q. Mr. Crocker, wasn't it, the gentleman here?

A. Yes.

Q. You gave me a copy of it? As a matter of fact, I had a copy of it, didn't I? What I wanted was the invoices?

A. I think you did have a copy of it.

Q. You made some—

A. Yes, you had it or something, and I said that—if I remember rightly, I was a little bit peeved because they did a lot of extra work there.

Q. Yes, that is right. That was the invoices that was attached.

A. Yes. It should have come to me, you see, and I should have told them what to give you. You were not interested in the clerk numbers, or anything like that, and I showed them how ridiculous it was to put all those clerk numbers and dates and amounts.

Q. You were rather peeved that they gave it to us, weren't you?

A. I could see that they did a lot of extra work. And then I didn't like it—those matters were in my hand, belonged to my department, should have come to me.

Q. You were peeved at them about that, not at us?

A. Oh, no, not at you. I talked with you about it. I believe I got the ledger card and showed you all about it.

Q. You said you spoke to me about matters connected with the claim or controversy?

A. Yes, you came up. We weren't running to you. You were running to us.

Q. What did I say to you about that controversy, and what did you say to me?

A. You told me—in what respect?

Q. Any respect. You said I talked to you about it.

A. You talked to me about the contract not being —in your estimation not being valid as to attaching creditors, or in a case where there had been a claim of bankruptcy.

Q. Was there anything else said about it?

A. Well, just refresh my mind about it. That is pretty hard. We talked it generally, and I showed you the figures, the ledger card, and also showed you the contract.

Q. There wasn't anything said bearing upon the hearing at Mr. Murphy's office?

A. Oh, no. That hadn't been talked of, because I said that we didn't intend to file a claim.

Q. Did you say that you didn't intend to file a claim?

A. Oh, yes, I told you we didn't intend to file a claim.

Q. Now, what is the amount of your open account by the card that you have there?

A. $13.05.

Q. What are those amounts made up of?

A. Well, I haven't the merchandise here, Mr. Teiser.

Q. I mean, what separate amounts?

A. There is $10.05 in March, and then there is $13 in March. When they didn't pay their March bill, we marked it "Send everything C. O. D." They bought other goods, and we sent them C. O. D. We didn't want to have any further business with them on a credit basis, although they had been making their

payments regularly on their contract.

Q. Now, they had been making payments regularly?

A. On their contract. But we didn't want their credit business on open account.

Q. Now, this contract, as I understand from your testimony, was to be how much down—$750 down?

A. Yes.

Q. And the balance of how much—$100 a month?

A. $100 a month, yes.

Q. And I think you testified something about requiring them to pay $250 at one time, did you?

A. Yes, before these goods were actually delivered.

Q. You required them to pay $250 more?

A. No, let me explain that. I don't think that is right. Before this original purchase was delivered—but before it was ready for delivery—they came in and made the other purchases. All these goods were delivered at one time.

Q. All of them?

A. All of them were delivered at one time. All the merchandise went at one time. They all went within, I should imagine, two or three hours of each other.

Q. Do you remember what date it was that they went there?

A. Well, I guess it was along about the 28th of December.

Q. The 28th of December?

A. Yes. All this merchandise was purchased, Mr. Teiser, and selected within three or four days of each other—ten days at the very most—although you will see the payment here was made, $750 was paid; you see, that was for the frescoing, and they paid that before we authorized the men to go ahead and work on it. It took them, of course, almost a month to do that work—three weeks.

Q. Now, as a matter of fact, they paid on that contract exactly $1500, didn't they? Or they paid $1500 on the contract, didn't they?

A. Yes, $1564.60. That represents merchandise—

COURT: That includes the $600 for frescoing?

A. Yes, that includes the $600 for frescoing.

Q. That was $750 payment made on November 26th?

A. Yes.

Q. $250 payment on December 21st?

A. Yes.

Q. That was before the goods were delivered?

A. Oh, yes. You see here, they were almost a month, you know, in getting that frescoing work done, and then the last moment they came in, for the reason that we knew they went around town trying to get credit, but they couldn't get credit, don't you see, and then they came back to us to make these additional purchases.

Q. On the 27th day of December there was $200 paid?

A. Yes, sir.

Q. The 22nd day of January there was $100 paid?

A. Yes, that is the first payment.

Q. And on March 5th there was $100 paid?

A. Yes.

Q. And on April 8th $100 paid?

A. Yes.

Q. Those payments which I have called off amount to $1500, do they not?

A. Yes, $1564.

Q. No, these, I mean, that I have called off?

A. Yes.

Q. And they are the only even payments that they made to you—round numbers?

A. Yes, sir, absolutely. All this merchandise was selected within ten days, and all delivered at once. All the goods went the same day.

Q. Now, these other payments were made for goods purchased, as a matter of fact, there is $9.00 for interest here, isn't there?

A. Yes, sir.

Q. And there is $8.60 for interest?

A. Yes.

Q. And these other payments were payments on goods purchased and taken out, were they not?

A. No. Maybe I haven't made myself clear, Mr. Teiser.

Q. Just let me ask you this: What was the 90-cent payment for?

A. 90-cent payment?

Q. Yes. They paid you 90 cents, or there is credit

given them for 90 cents.

A. I don't know what that 90 cents is for.

Q. You don't think they came in and paid 90 cents on their account?

A. No. I don't know what that 90 cents is for. I will tell you what I think it is, though. I think that this was something that they didn't want charged; says he, "I will pay for it." But the sales-check had already gone through on a charge, don't you see, and it would make a difference of our cash sales, and inasmuch as the goods had gone through on a credit sale, we would have to put it on the account, unless we got at the original check and changed it from charge to pay transaction; and inasmuch as it had gone through, why, they just paid it on their account.

Q. Do you know what the $23.00 payment was for on the 27th day of December?

A. Yes, that was on a similar proposition. That was handled through Mr. Frank, because they wanted some merchandise charged on that, and he says, "No, we got enough;" they had enough.

Q. They paid cash?

A. Well, they said "We will give you $23 more," whatever it is; he O.K.'d it.

Q. That was a cash payment, was it?

A. No, it was on the account. For instance, he might have went $70 more or $75 more, and they said, "We will pay $23 and charge it up."

Q. He paid this $23.00?

A. Yes, but you see he wanted to charge about $60

more. I was fighting with Mr. Frank, the owners of the business against this contract. And Mr. Frank, when we got this $23.00—that was the incident—I remember he spoke to me about it, since you refresh my memory—they got $50 or $60, something like that, so he said, "I got half cash. Charge the rest of the account up."

Q. What is the payment of $23?

A. That is merchandise returned.

Q. And the $7.20?

A. Is merchandise returned, yes.

Q. And what is the $1.50 for?

A. That is merchandise returned.

Q. Is that merchandise returned?

A. That is merchandise returned, yes.

Q. So the only item in addition to the $1500 on the bill that you think was obtained on the contract, or paid on the contract, was $23.00?

A. Yes, that is an allowance, that $1.50.

Q. An allowance?

A. Yes. What date is that $23.00? Maybe I can tell you.

Q. It was the 27th day of December.

A. The 27th day of December?

Q. Yes, $23.

A. Well, I couldn't tell you what that is.

Q. Now, you say that all these goods were gotten at the same time?

A. Delivered at the same time, yes.

Q. Delivered at the same time?

A. Yes.

Q. And they were delivered about the 28th day of December?

A. Yes, sir. They were trying—they were making herculean efforts to get that through by the first of the year. They wanted to open the first of the year.

Q. All of it was on the contract?

A. Every bit of it, absolutely.

Q. And was understood at the time?

A. Absolutely.

Q. And all the goods were chosen by the 28th of course, had to be, if it was delivered by then?

A. Yes, sir.

Q. Will you explain why goods amounting to $1369.72 were dated January?

A. Yes, because we close our books, don't you see —we closed our books in December—I should imagine we closed our books on December 26th.

Q. So from December 27th on, you would date it—

A. January, yes.

Q. January?

A. Yes. The same as you get your bills. We advertise, don't you see, all purchases for the last five days of the month go on the next month's bill.

Q. Well, now, will you explain the goods purchased on January 28th—I mean, December 28th, January 3-6-10 and 25? How is that on the same bill?

A. What is that, now?

Q. Why are the goods shipped on the 28th, or purchased on the 28th of December, January 3-6-11 and 25 on that bill, if they were sent on the 28th?

A. Because I have explained to you we close our books on the 26th, and all purchases made from the 26th appear on your January bill.

Q. Is that the reason why goods purchased on January 3rd and 6th, for instance, were sent on December 28th?

A. No, they were actually purchased on these dates.

Q. They were purchased on those dates?

A. Yes, sir.

Q. How did you get that in the conditional contract, if all the goods under the conditional contract were sent on the 28th?

A. Because it was our understanding that every thing they might buy in the furnishing up of this place was to go on conditional contract.

Q. All that was got on the 28th of December—delivered on the 28th?

A. Except those few little items on the end there. I will explain that from here down there is a few dollars, don't you see, from there to there. Those were fill-in, don't you see?

Mr. HANEY: That is where they hadn't enough of something?

A. Yes, that is where they hadn't enough of something. If they were out a few yards of carpet,

they would have to come back and put in a few fill-ins, whatever they might be. If you will look back, there are fill-ins on shades. We didn't have enough shades. We went down and fixed up the shades there. For instance, a dozen—this is a dozen table tops. We didn't have enough tops. And they lacked a rug. They decided they would put the rug in. That rug was $10. They were out of napkins. They sent down for $18.75 on napkins.

Q. Going back to that item of 90 cents that was paid on the 27th day of December, and it is placed on the lease contract—that is the lease contract, isn't it?

A. Yes. 90 cents. I don't know what that is.

Q. Here is a bill of December 27th, one comb—four combs, 90 cents.

A. That is it, don't you see. That should have been on the open account.

Q. Should have been?

A. Yes, should have been on the open account.

Q. But it was on the lease account?

A. Yes, it got over there.

Mr. HANEY: Just explain how it got on the lease account. I don't think Mr. Teiser understands it.

A. We had two accounts with them—an open account. These are combs. We naturally wouldn't be entitled for combs, for sanitary reasons, nobody would ever expect to take those back. When this bill came up, their attention was called to it. Somebody paid the 90 cents—came up with the 90 cents. We found out that it, by an error, had been paged in this

account. When we say paged, we mean charged to that account. We had the 90 cents, we had the charge, so one offset the other. In this grand total of the amount sold on the contract, this 90 cents probably should be deducted. You see, in fact, one offsets the other.

Q. Did you transfer one from the lease account to the open account?

A. No, we didn't do it, because it was so easy, you see, to put it on there.

Mr. HANEY: Accomplished the same thing by giving them credit for 90 cents payment, didn't you?

A. Yes, sir.

Q. In other words, if they had come in and purchased those combs and it had gone through lease account, you saw it was to be paid for in cash, you couldn't stop the slip, it was easier to charge the amount and credit the account with the 90 cents?

A. Yes. Of course, it is such a trivial proposition —it should have probably been journalized, a bookkeeper that was extremely careful, when they saw this charge coming, should have journalized it on the open account, and then when the money came put the money on the open account, where in truth it belonged. But this saved a journal entry.

Q. I will ask you, Mr. Kiernan, whether the goods that was purchased under the bill of December, dated December, amounting in all, without the credits being given, to $1797.94—I will ask you to examine that and state whether that does not include

practically all of the fixtures that were gotten by that firm at that time, excepting a few odds and ends.

A. No. As a matter of fact, this whole merchandise was purchased prior to these dates, a considerable time prior, but we held the charges in the credit office—we would not O. K. them, you see. They don't appear on the bill until we actually O. K.'d the charge, and as they paid up, we would release. For instance, you will notice the carpets were released first, because they were anixous to get the carpets in.

Q. I am asking this: whether or not the December bill, or the bill marked December, 1912, amounting in all to $1797.94, whether that didn't include practically all of the fixtures that were obtained by the Italian Restaurant, except things to fill in after the rest was obtained?

A. No, here is the rest of it here.

Q. Answer that Yes or No.

A. Why, no.

Q. It didn't. Now, that bill includes 150 chairs. That was practically all the chairs that they thought they would need, wasn't it?

A. I don't know as to that, Mr. Teiser. If there is any more chairs in here, they probably needed them.

Q. I mean, that they thought they would need at that time?

A. Yes.

Q. And it goes on with twelve tables, 380½ yards carpet, 3 bales lining, 16 yards padding, 1 door mat,

20 dozen teaspoons, 6 dozen dessert spoons, 1 dozen tablespoons, 20 dozen forks, 20 dozen knives, 2 oyster forks, 2 steak knives, 3 pair carvers, 27 sugar bowls, 3 meat carvers, etc. down the list in large quantities?

A. Yes, sir.

Q. Now, when you come to your January account, which is the account which we claim has no business going on that lease, it is one dozen table pads, 2 table cloths—

A. What date are you reading now?

Q. December 26th, the account of January. And 1 table pad, 5 dozen towels, 1 dozen towels, 1 table pad, 4½ yards of Velour—

A. Mr. Teiser, let me interrupt you. All that you are reading now was put in before the furniture, don't you see?

Q. Now, as a matter of fact, isn't all that was bought in January, or practically all that was bought in January—

A. Why don't you read on down?

Q. You interrupted me, Mr. Kiernan.

A. Read on down. On December 26th you will see comes the charge for $650.

Q. That is what I was going to ask you. As a matter of fact, what was included in this January account was practically all decorations, or in a measure decorations, as a whole. I don't mean every article. For Velour, and for portieres, and for brass poles, and for sockets and for rings, for portieres and for Velour

again, and for labor, and for portieres, and for windows, and for Venetian shades, and for draperies, and for Venetian shades, and for treating walls and ceiling in oil by Passil & Fulton, $650, etc. A pair of curtains and Venetian blind, and shades, and then four dozen spoons. And four rockers, 1 settee, 1 table, 2 chairs, 1 table and 3 rugs—that was for the dressing room, wasn't it?

A. Yes—I don't know.

Q. And 13 2-3 yards of carpet, 1 sweeper, 6 tablecloths, and cushions, etc., through the list?

A. Yes.

Q. Now, practically all of that was for decorations, wasn't it?

A. Yes.

Q. And not for fixtures?

A. Well, you see, this was all done at the same time.

Q. I understand, but I am just asking you the fact.

A. Yes, sure—decorations. You see, we gave the contract for the frescoing on the 27th day of November, but the charge was not put through until the 26th day of December.

Q. Did you expect to take a conditional contract on furniture for money expended in decorations, frescoing and painting walls, etc?

A. As additional security, yes. This is security. As a matter of fact, we could have just did like we did with this 90 cents comb, you see, just exactly as we did with the 90 cents worth of combs—we could

have opened up a regular account, and charged it with frescoing account, then put the $650 on that, $650 on the other; the one offset the other.

Q. The $1500 which is set forth in your contract has been fully paid, hasn't it?

A. No, sir.

Q. Hasn't $1500 been paid to you?

A. That depends upon how you are going to interpret it.

Q. There has been paid to Meier & Frank $1500?

A. Yes, sir.

Q. And all of it has been applied to the lease account, hasn't it?

A. Yes, sir.

Q. You stated that some of the creditors called you up and asked you how you were selling these people?

A. Yes.

Q. What creditors called you up?

A. I remember Fleckenstein-Mayer called us up.

Q. Fleckenstein-Mayer called you up?

A. Yes. I remember other creditors, but I remember Fleckenstein-Mayer, because I remember I advised him to keep out of it.

Q. Fleckenstein-Mayer is another creditor, is it not?

A. I don't remember whether it is or not. If he followed my advice, he is not a creditor.

Q. What creditors called you up?

A. I remember the reporting agencies were calling up.

Q. But no other creditors who were selling these people goods called you up, did they?

A. I wouldn't say as to that. I don't know whether they were creditors or not, because I haven't seen the list of creditors. There was a great deal of calling up. Inasmuch as I was handling it, I said "Just tell them it is buying on contract. We don't know anything about it."

Q. What advice did you give Fleckenstein-Mayer?

A. To keep out of it. I don't know whether, I knew Montrezza was there—his credit is such that he couldn't get ten cents practically; therefore, I didn't go much on his being secretary of an organization expecting to get very much out of it.

Q. As a matter of fact, what was the reason you got Mr. Everett and Mr. Pearson to guarantee this contract?

A. Because, you see, the bulk of the goods sold here are materials that, if we have to take back and sell the second-hand man, because we cannot take any old goods back in our store—whatever we pull goods, as we say among credit men, which we don't do very often, because our credit is higher grade, we send them to the second-hand man. Old goods never come back to our store. These goods, if we had to take them back, they would amount to very little.

Q. Why did you feel it necessary to have Mr. Pearson and Mr. Everett—I presume Mr. Pearson's credit is good?

A. Yes.

Q. Mr. Everett's is good?

A. Yes.

Q. Why did you deem it necessary to have Mr. Pearson and Mr. Everett—in addition, rather, to Mr. Pearson's and Mr. Everett's guarantee, why did you deem it necessary to have a sales contract with them, or conditional sales contract?

A. It was necessary because they were buying, don't you see, they kept buying material which would gradually depreciate in value.

Q. Well, wasn't Mr. Pearson's credit good?

A. Yes, it was.

Q. What was the occasion for a conditional sales contract?

A. Because we wouldn't O. K. the stuff unless he signed it.

Q. After he did sign it, what was the occasion for a conditional sales agreement?

A. Because that was necessary. We wouldn't let even Mr. Pearson—

COURT: You wanted to have all you could get as security, I presume?

A. Yes, sir. Just like taking a note. All the indorsements on it are valuable. Mr. Pearson, before he would buy $3200 from me, would have to make some arrangements for protection, because that is a whole lot of money to sell a person on open account.

Q. When this agreement was signed, Mr. Kiernan, there wasn't any memorandum attached to it, was there?

A. You mean these bills?

Q. Yes, any memorandum at all?

A. Oh, no, these bills—couldn't do it, because, you see, we couldn't get the sales-checks out.

Q. Was there any memorandum of any kind except this one contract that was signed?

A. That was all.

Redirect Examination.

Q. This contract of lease is dated the 26th day of November?

A. Yes, sir.

Q. And about all these goods, nearly all of them, were delivered about the 28th day of December?

A. All within two days.

COURT: That is more than one month after this contract was signed.

A. Yes, your Honor, because they were engaged in cleaning up.

Q. They did all the frescoing between that time?

A. Yes. They might have hung a few curtains. But you see in our store a man cannot cut out—he cannot cut this expensive Velour for curtains unless the credit office O. K.'s the charge. So while the charges might have been O. K.'d, the goods were not delivered till some time afterwards.

Examination by the Court.

Q. Mr. Kiernan there has been brought out here, this contract was signed on the 26th day of November, and this contract says you have sold goods "de-

scribed in the list hereto attached and marked Exhibit A." Was that list ever attached to this contract?

A. Yes, they are always.

Q. Which is the list?

A. It becomes a copy of our bills. Every contract, there is an original bill goes to the customer—sometimes you get your bill on the first of the month; then there is a duplicate which goes in a binder, which are kept there, which are permanent records of the store, and a triplicate goes on here.

Q. Was that list attached with the concurrence and consent of the buyer?

A. Of the people signing it, yes, because a great many people say, for instance, sometimes we leave this blank, and they say "Well, now, how about this figure?" "Well," we say, "We only ask you to pay for what is afterwards attached," you see, to their bill.

Q. That leaves it with the seller to fix his own Exhibit A, and attach it thereto, and thereby it is made part of the contract?

A. He understands, your Honor, that is just going to be a duplicate of his purchases.

Q. Well, that is outside of the contract, so far as his understanding and yours might be with regard to attaching the "Exhibit A." Now, that "Exhibit A" was not really attached when that contract was drawn and signed?

A. No, it is impossible to get it. It would be impossible, don't you see, because he would not know

how much it was going to cost.

Q. Well, are those contracts drawn up beforehand in anticipation of running a bill at your store?

A. Yes. Not running a bill, but to include a certain amount, or include the fitting up of a place.

Q. Well, now, I understand here that the purchaser has traded on this contract to the extent of $3213?

A. Yes, sir.

Q. And the consideration of the contract is $1500, and the contract provides that $1500 shall be sold; that is, goods shall be sold, and that for those goods the purchaser shall pay $1500. Now, that marks the extent of your contract?

A. Maybe I haven't made myself clear. You see, when he came up on the 26th of November, at that time we were only going to sell him but a few articles. Among others was the $650. And he paid $750. This was to be the first part.

Q. $650 was the work of frescoing?

A. Yes.

Q. That was not an article out of your store at all?

A. No.

Q. But you have it down there as though you had sold him the $650 frescoing?

A. Yes, sir.

Q. And you charge that on the bill, and that has gone into the items which you say have been attached as the risk of that contract. Well, now, let us get back here again. Under that contract, now, you have

sold him altogether, according to this statement, $3213 worth of goods, including the frescoing?

A. Yes, sir.

Q. And he has paid you divers amounts. How much has he paid you altogether?

A. He has made three payments of $100 each.

Q. How much has he paid you on that account altogether?

A. You see—

Q. Answer my question.

A. The whole amount?

Q. Yes.

A. $1564.60.

Q. He has paid that on that account?

A. Yes.

Q. Well, now, what were you going to answer to that?

A. He came up—the original contract, that is, when he spoke of it first, $650 would leave a balance of $100, and then he purchased six hundred and this amount—$624.

Q. $624. That is not the first item. $412 is the first item.

A. That was the purchase, however, for the sales checks didn't come through. They had to measure up the carpets—we estimated.

Q. You have $412 charged?

A. These charges came through first. We took care of those. You see it takes a little time to go down there and measure up the carpet and lay it and line it,

and the chairs, don't you see, was easily put through and charged. They were the first thing we took care of. This item here of $250—

Q. That is a payment?

A. Yes, that is a payment. This took in this item —this one and that one.

Q. Which—$750?

A. Yes.

Q. I thought you said—

A. No, the difference, the $100 and the $250.

Q. Paid it out on the first item and the second item?

A. Yes. You see, he kept paying more money, we kept O. K.'ing more goods, because that was on our contract: one-third down for furniture and one-third down for cut material.

Q. According to your idea, this contract could have gone on, and he might have paid all this up except $150, and then bought some more goods?

A. Yes, sir.

Q. And it would all apply on this contract?

A. Yes, sir, that is done, and it is done this way frequently. We have the Chesterbury Apartment, for instance. I think they owe us now $6,000. The original contract was $5,000, and they paid up, I believe, something like within about $1,000. Now then, we sold them $3,000 worth more. We added that on the ledger; just go on adding that down, don't you see; kept it on the original paper.

Q. Running month by month and year by year?

A. Running month by month and year by year on the original paper. That is not the only one. That is done on three—well, I might say, it is done on one-third of our contracts.

Q. It seems to me you are bordering on dangerous grounds in trading that way, especially when the stocks go into bankruptcy.

A. That is the way we have been doing, your Honor. And other stores do the same. You see, a young married couple will come in, they will say they want to get a dining room set. It may be $60, and we will take $20 down, and they pay all up to $10. Then they say "We want an extra bedroom set." We won't even ask them to make a payment down. We will charge under the original contract.

Q. It seems to me the contract is all right, if you attach a list to the contract so you can identify those goods, and you can hold them as far as that goes; but when those goods are paid for, and then you sell other goods and undertake to apply it on that contract—

A. It is in our opinion we still hold title to it, and in the opinion of the majority of the purchasers we still hold title, because they say "Why should you be afraid? You have got $200 on my property here as security." When we try to get some more money out of them, they say I have got $200; that is security for it; when we try to get some money down on some different purchases. We have contracts there that have been running ever since we entered the contract

department.

Q. That might be true, and not make them legal.

A. Of course, that is for the courts to determine; not we. We are willing to sell the merchandise. At the same time, if we cannot do this, why, then, we are not going to do it any longer.

Q. Of course, you ought to know whether you are on safe ground.

A. We pay our attorneys enough. If they don't do, we pay somebody else. That was my intention—I was the only one in the store talked about it. It was the intention of Mr. Everett and the intention of Mr. Pearson.

(Excused.)

Adjourned until 10 A. M.

Portland, Oregon, October 4, 1913.

A. E. GEBHARDT, called as a witness on behalf of the trustee, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. TEISER:

Mr. Gebhardt, what connection did you have in reference to the bankruptcy matter of the Italian Restaurant Company, a corporation?

A. I represented several of the creditors that had claims against the corporation.

Q. You were the attorney for the petitioning creditors, were you not?

A. Yes, sir.

Q. Were you present at a hearing on or about the

14th day of July, 1913, at the Referee in Bankruptcy's office, Mr. Chester G. Murphy, at the time when the question of the validity of the claim of Meier & Frank to certain property was in question?

A. I do not recall the exact date, but it was about the middle of July that a meeting was held at his office, and I was present at that meeting, and this question came up.

Q. Will you state as to whether or not there was any stipulation or agreement that a claim should be filed, or any conversation or anything else that occurred in reference to a claim being filed, of Meier & Frank against the trustee, for the recovery of these particular goods which are in controversy?

A. Well, to the best of my recollection, there was some discussion as to the filing of a claim by Meier & Frank. I understood that they had a contract for the furnishing of dishes and linen and things of that kind, and that that contract—I think Mr. Joseph claimed that that contract had not been met, and that the goods belonged to Meier & Frank; and the question of filing a claim came up, and I left the meeting with the impression that an agreement had been reached that the claim should be filed.

Q. Well, was that impression the result of anything actively said at the meeting?

A. According to my recollection, after some talk, Mr. Murphy said something to this effect: I don't pretend to recall his exact words, but he said something to this effect: "Well, we will consider the claim

filed, then." And Mr. Joseph said "Yes"—something of that kind. I couldn't recall the exact words that were used, because I was simply there looking out for the interests of my clients.

Q. Was there a formal presentation of the claim of Meier & Frank and of the trustee at that meeting?

A. I didn't see any, no, sir; that is, no paper was handed in that I could see, excepting the—

Q. I don't mean that; but was the matter fully gone into at that meeting as to the validity of that claim?

A. Yes, there was a good deal of discussion about it at the time.

Cross Examination.

Questions by Mr. HANEY:

Q. You say you have the impression that Murphy said, "We will consider this claim as filed?"

A. Yes, sir.

Q. And that Mr. Joseph acquiesced in it?

A. Yes.

Q. Do you remember having any impression as to what Mr. Joseph said about it?

A. Why, Mr. Joseph at first seemed to have some reluctance about filing the claim, or about presenting this contract; and now I cannot recall, of course, just the words that passed between Mr. Teiser, Mr. Murphy and Mr. Joseph, but finally Mr. Joseph said, "Well, then, we will agree to that."

Q. We will agree to what?

A. That the claim shall be considered as filed. That was the question that came up.

Q. Did you hear any discussion between Mr. Murphy and Mr. Joseph about bringing a suit or action of some kind for recovery? Do you have any recollection of that?

A. I think that Mr. Joseph said that he would bring a suit later; that if any suit was brought, he would try that question later.

Q. And what was Mr. Murphy's reply, do you know?

A. No, I don't recollect.

(Excused.)

GRACE ARNOLD, called as a witness on behalf of the trustee, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. TEISER:

Miss Arnold, your occupation is that of a stenographer? Public stenographer?

A. Yes.

Q. Did you take the testimony before Chester G. Murphy, Referee in Bankruptcy, in the matter of the Italian Restaurant Company, in reference to a claim of Meier & Frank to certain property claimed by them,, which was held by the trustee, on or about the 14th day of July, 1913?

A. Yes, I did.

Q. Have you your notes of that testimony?

A. Yes.

Q. Your shorthand notes?

A. Yes, I have.

Q. Will you turn to your notes, and state whether or not any stipulation of any kind, or any memorandum of any kind, was attempted to be dictated to you in that proceeding, other than what is set forth in this testimony which I hand you?

A. No, there was not.

Q. There was testimony to the effect that at the beginning of the proceeding I, as attorney for the trustee, attempted to dictate something which would appear to make the matter a more formal matter than appears in the testimony as taken, and that Mr. Joseph objected to it, and that after the objection the matter was not proceeded with in that regard. If such a condition existed, would you have taken it down, if I started to distate something?

A. Well, if you had started to dictate it to me, I would have taken it down.

Q. And if you had started to take it down, your notebook would show it?

A. My notebook would certainly show it, yes.

Q. Will you refer to your notebook, and see whether anything is scratched out, or anything relating to the proceeding except what is stated in the transcript of the testimony?

A. No, there isn't anything here except what is written up in the transcript.

Q. I will ask you to identify this testimony which

I now hand you, to which I have referred.

COURT: Did you make that transcript?

A. Yes, I made it.

COURT: I think that is identification enough.

A. It is just the same, Mr. Teiser.

Mr. TEISER: I will ask that it be filed as one of the trustee's exhibits.

Received and marked "Trustee's Exhibit C."

Cross Examination.

Questions by Mr. HANEY:

Miss Arnold, did you hear any conversation there concerning the filing of a claim by the Meier & Frank Company?

A. Well, I don't distinctly remember. Of course, I heard everything that was said, but I don't remember. I hear so many little things.

Q. That record shows all of the record that was made there at that time, doesn't it?

A. All of the record that was made, yes.

Q. You know Mr. Joseph, do you?

A. Yes. There is Mr. Joseph there.

Q. Do you recall hearing any conversation between himself and Mr. Murphy concerning the filing of a claim by Meier & Frank Company?

A. I really don't recall it, no.

Q. If there had been any conversation wherein there had been a verbal agreement between them that the claim should be considered as filed, you would have taken it down, would you not?

A. Not necessarily.

Q. Well, you took everything down that was connected with the hearing, did you not, except that?

A. I took all the testimony. Sometimes they talk things over there, over there in the bankruptcy court, that I don't report.

Q. You don't report all that is said, then?

A. No, I don't.

(Excused.)

GEORGE W. JOSEPH, called as a witness on behalf of the claimant, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. HANEY:

Mr. Joseph, you were an attorney representing somebody at a meeting in Murphy's office about the 14th of July last?

A. Yes.

Q. Just detail to the judge the circumstances under which you went there, and what happened after you got there.

A. I represented, of course, Meier & Frank Company in going there. There had been repeated demands for us to appear before the referee down there concerning this property. We had made demand on the trustee for this property, claimed it was conditionally sold or leased to the bankrupts. And after being requested to go several times, we went down there on the day that was set for the examination of

the bankrupt, as I remember it, and we went down there for the purpose of making known our claim to the referee, under oath, if he desired to know about it, and also to the trustee. We went down there—

Q. When you say "we," who went with you?

A. Mr. Kiernan. And Mr. Kiernan was the only person I took down, because he was familiar with all the facts and circumstances, and all I wanted Mr. Murphy, the referee, to know was that our claim was absolutely in good faith, and virtually to make a further demand upon the trustee for this property. I wanted a witness there who could fully explain the circumstances, which was the only object in going there. No claim had ever been filed, and we didn't intend to file any claim in that court for this property, any written claim. But we had demanded it of the trustee. We met there, and Mr. Murphy came in in a few minutes, and Mr. Teiser was there representing the trustee, and Mr. Murphy announced that I was there representing the Meier & Frank Company, and might hear what our claim was. So I said, "All right. We will have Mr. Kiernan explain that to you." And he administered an oath to Mr. Kiernan, and proceeded to take down the testimony. Now, just before they started to take the testimony, Mr. Teiser was fidgeting around there, and he started to dictate something. And I made the remark—he was going to dictate a formal proposition to the stenographer, so and so appearing for so and so. I says, "This is an informal hearing. We are simply here to

let you know what our claim is." Mr. Murphy coincided in that, and went right ahead with the examination. I produced the bill of sale, or the conditional sale, or the lease, and Mr. Murphy looked it over; and then the question was asked as to the amount of the purchase-price or the lease price, for the absolute owner of the property. And it appeared that it was more, pretty near twice as much as was mentioned in the lease. And as soon as we reached that point, Mr. Murphy said that he didn't believe it could be varied by oral testimony. After some little talk, I says, "If you take that view of it, there is no need of going any further. You know what our claim is, and," I says, "I will proceed to replevin the property." And he says, "I will give you the right now to sue in any court." Mr. Teiser now spoke up and said they had to sue in the United States Court. I didn't know that at the time, that we would be compelled to go into the United States Court to recover that property from the trustee, and I don't know if that is true yet. But Mr. Teiser said, "Well, they have to go to the United States Court," to Mr. Murphy. Mr. Murphy says, "I will give them the right to sue in any court wherever they please." There was no formal order entered in our presence, and no order made. We went away, and they simply went ahead with the proceeding set for that time, which was the examination of the bankrupt—the officers of the bankrupt.

Q. There has been some testimony introduced, Mr. Joseph, to the effect that you agreed with Mr.

Murphy verbally that the claim might be considered as filed, and the testimony heard under those circumstances?

A. There was no such agreement. Now, Mr. Murphy has a large amount of business down there, and he is simply mistaken about that fact, because I never stipulated to anything about a claim being filed, because we never intended to file any claim there. We were going to recover this from the referee in case our demand for the possession of it was not honored.

Q. Do you know anything about the original sale that was made at the store?

A. No.

Q. You, personally, have no knowledge of that?

A. None.

Cross Examination.

Questions by Mr. TEISER:

Mr. Joseph, you say that Mr. Murphy at that meeting called a witness Mr. Kiernan?

A. I says, "We have Mr. Kiernan here, He will explain the circumstances to you."

Q. And he was put on the stand?

A. Yes.

Q. And then you said I began to dictate some formal statement?

A. Well, you kind of fidgeted around there a minute, and wanted to make it a formal matter, you see, and I said No.

Q. What do you mean by fidgeted around?

A. You kind of moved around from one place to another, and started to dictate something to the stenographer.

Q. Yes, I started to dictate something to the stenographer?

A. Yes, and it was called off, that proposition.

Q. And you suggested to me or to Mr. Murphy that that was not a formal proceeding?

A. I says, "This is simply an informal proposition here. We are here to explain the circumstances of this contract to you; nothing more."

Q. And the stenographer struck that off her minutes, I suppose?

A. Whatever there was taken down there—she started, and that is all. As soon as you started to dictate something, I knew what you were going to do, I presumed so, and simply objected to it.

Q. Your firm is attorney for the Meier & Frank Company in this proceeding, is it not?

A. Yes, I stated that.

(Excused.)

[Oral Decision of Court.]

COURT: This contract purports to be in writing. It is a contract by the terms of which the Meier & Frank Company agrees to sell certain goods, and the consideration of that sale is $1500. Ordinarily, the consideration can be varied in a contract of sale, or in a deed, but this $1500 seems to have been couched in the contract for the purpose of indicating the real

value of the purchase, the real consideration that was agreed upon there. There is another thing about this contract. It purports to have attached to it and marked "Exhibit A" a list of the property. It says, "The seller hereby promises and agree to sell and transfer unto the purchaser all of the personal property described in the list hereto attached and marked 'Exhibit A.'" Now, if there had been a list attached and marked "Exhibit A," the list would make this contract definite and certain. It doesn't appear to me that this can be a definite and certain contract until such a thing is done. And it developed by the testimony of Mr. Kiernan yesterday that it was not really the intention of the parties to attach a particular list to this contract; but the sellers depended more, and entirely, I might say, upon their book account in the store, and when they got through with that, they concluded that that was a part of this contract, and it is not attached and never has been; so that there never has been a completed written contract as to this sale of goods.

Contracts for the sale of real property are required to be in writing, and contracts for the sale of personal property, where the amount of the sale is over a certain amount, which I don't remember without referring to the statute now, there must be a payment of $50 in order to make the sale good. I don't know that that has any real bearing upon the question here. But in the course of the testimony of Mr. Kiernan he speaks of this contract as a lease, for the purpose of

retaining a lien on these goods for the purchase-price, and with the right to retake the goods and also claim the title afterwards, because it is claimed the title never passed to the purchaser. According to the theory of Meier &Frank as to the use of this contract, they could sell from time to time, and keep open a running account from month to month or from year to year, as I inquired of the witness, and whatever they sold hereafter, whatever time it might be sold, this contract would take effect on that property and hold it, and there would be no absolute sale, or at least it would only be a conditional sale for all purchases made which Meier & Frank desired to be affected by this contract.

Now, it has been argued that this contract, notwithstanding it was not made perfect, would be aided by verbal testimony; or, in other words, that a conditional sale might be consummated through oral testimony. I think the vice of that argument is that the parties have attempted to show a conditional sale under a written contract, and in attempting to do that, it is shown very plainly and convincingly that the written contract never was completed, because there never was any "Exhibit A" attached to it, and goods sold under this contract have never been identified according to the contract. While this contract, and what verbal contract might have been made as to additional goods, possibly might be good as between the parties, yet when outside parties have been permitted to deal with apparent owners of these goods, with-

out knowledge of the fact that the person is not the owner, and with the belief that he is the owner of the property, when he has gone into bankruptcy, the creditors take as bona fide purchasers of that property, and it does not seem to me that it is just and equitable to the creditors in this case that they should be made to suffer by reason of a sale that is a pretended sale, that has never been consummated, and with a verbal understanding that Messrs. Meier & Frank should retain the title to this property, or, in other words, that they should retain a continuing lien upon whatever property is sold to apply upon account.

I think, under the circumstances and conditions of this case, that the court will declare that Messrs. Meier & Frank are not the owners of this property as against the trustee, and that the decree will be that the title be confirmed and settled in the trustee.

As to the other point, I do not think the record or the testimony shows sufficient upon which to determine that there has been a res adjudicata in this case.

I will say, in further illustration of what I have said, this written contract was drawn up and signed on November 26th, and it purports to have attached to it the "Exhibit A" which would identify it properly. But instead of that, here is the account which runs in December and January, covering both months, and a little bit in February, not a very large amount; and that entire account runs up to $3200. The only con-

sideration named was $1500, and more than that has been paid on this account, so we may say that the contract for the purchase-price as fixed by the written contract has been paid and discharged, and so far as the other is concerned, it must stand entirely upon the verbal account, or not have any standing at all. But I don't think that you can supplement a written account by a verbal account in that way so as to hold the conditional sale.

Now, there is part of this sum, six hundred dollars and more, that was not really a sale at all, but that Messrs. Meier & Frank assumed the payment of the cost price of doing the work. Still at the same time the parties are claiming a lien, according to Mr. Kiernan, upon the frescoing that was in the room itself.

Mr. HANEY: If you will permit me to interrupt, I don't think Mr. Kiernan meant to testify to anything of that kind.

COURT: That is the impression I drew from what he said.

Mr. HANEY: I think you must have misunderstood him. He certainly didn't claim there was any lieu upon that frescoing. I think that was made clear by other questions. I think your Honor is mistaken. I haven't got that impression.

COURT: That aside, I don't think there is sufficient anyway, so the court will decree as I indicated before.

Mr. TEISER: I understand this is a suit in equity, and that all the relief ought to be given in this suit.

That is my contention, at any rate. Now, unquestionably, or probably there is going to be a loss resulting from the delay in the sale of this property caused by Meier & Frank, and I would ask your Honor whether or not it would be proper in drawing this decree to leave the case open for a later ascertainment in this particular case as to the damage which was caused, so the decree may be further drawn.

COURT: My view on that proposition is that Messrs. Meier & Frank had a colorable right, colorable title, and they were pursuing that in good faith, and if they happened to be wrong and there was delay in this matter, I don't think there ought to be any damages.

Mr. TEISER: I will abide by your Honor's views in the matter.

Mr. HANEY: I don't know what the rules of the court provide for, for the purpose of appeal. I would like to give notice of appeal now in open court. If I find it is necessary to give it in writing, I will do so later.

[Endorsed]: Filed Oct. 18, 1913.

A. M. CANNON,
Clerk U. S. District Court.

[Trustee's Ex. A.]

L 2280

AGREEMENT

Portland, Oregon, ...191.....

Purchaser .....

Address .....

.....

Occupation .....

Resided in City .....

Former Residence .....

Terms .....

.....

.....

Remarks .....

.....

.....

.....

This certifies that Meier & Frank Company, a corporation as seller and Italian Restaurant Company, a corporation as purchaser, have entered into a contract, as follows, to-wit:

In Consideration of the payment to it of the sum of Fifteen Hundred ($1500.00) by purchaser as hereinafter provided, the seller hereby promises and agrees to sell and transfer unto the purchaser all of the personal property described in the list hereto attached and marked "Exhibit A," which is hereby made a part hereof.

The purchaser hereby promises and agrees to pay the said sum of Fifteen Hundred Dollars ($1500.00) as follows: $750 Dollars upon the execution and delivery of this contract, receipt of which is hereby acknowledged, and the balance in monthly payments of one hundred Dollars each, one of said installments

to be paid on the 5th day of each and every month hereafter until the whole amount above mentioned shall have been paid.

Deferred payments shall bear interest at the rate of 6 per cent per annum payable monthly.

It is understood and agreed by and between the seller and purchaser herein that the purchaser shall have the possession of said property from the date of this agreement; but that time is the essence of this contract, and that if said purchaser shall sell, dispose of, or encumber, or attempt to sell, dispose of, or encumber said property or any part thereof, or shall remove, or attempt to remove same, or any part thereof from the premises numbered Third and Alder Street, in the city of Portland, Multnomah County, State of Oregon, without the written consent of the seller, or if the said purchaser shall fail to make any or either of the payments above specified or if said property, or any part thereof, shall be attached or levied upon, or if said purchaser shall fail to secure insurance as hereinafter provided, then and in either of such cases, the seller herein may take immediate possession of said property, wherever the same may be found.

The purchaser herein promises and agrees to have said property insured at his or her expense for a sum not less than $1500.00 Dollars, in a responsible insurance company, satisfactory to the seller, with loss, if any payable to said seller, as its interest may appear, and to deliver the policy therefor to the seller and it is also understood and agreed that destruction of or

damage to said property by fire or otherwise shall not relieve the purchaser from payment therefor.

It is expressly understood and agreed that the title to said property shall remain in the seller until each and all of the payments hereinbefore mentioned shall have been made by such purchaser, and that if at any time said seller shall take possession of said property as hereinbefore providing, then in such event any amount or amounts of money paid by said purchaser, under this agreement, on said property, shall be considered as payment for the use of said property by the purchaser, and the purchaser shall have no claim against the seller on account thereof, and in case any action or proceeding at law is instituted by the seller herein to secure the possession of said property, or any part thereof, or to collect any amount becoming due hereunder, then and in such event the purchaser herein promises and agrees to pay such sum as the Court may adjudge reasonable as attorney's fees in such action or proceeding.

In Witness Whereof, the parties hereto have executed this agreement, at Portland, Oregon, this 26th day of November, 1912.

(Seal) Meier & Frank Company,
By J. L. Meier.

Payment guaranteed by:
C. V. Everett,
(Seal) Italian Restaurant Co.
416 B. of Trade
M. G. Montrezza,
Secretary.

C. V. Everett,
President.
Payment guaranteed T. Pearson.

March 1913 L|2280

Italian Sestaurant
Third & Alder Sts
City
Mar

4907	1	4	Yds Carpet	50		2 00
4907		35	1-3 Yds. Carpet	50		17 67
						L|2280

January 1913

Italian Restaurant
S E Cor 3rd & Alder Sts
City
Dec

1311	27	1	Comb		35	
		1	"		25	
		2	"	15	30	90

January 1913.

Italian Restaurant,
S. E. Cor. 3rd & Alder Sts.
City.
Jan

901	2		Allowance on 2 Dz Knives			1 50
2000	11	1	Dz Table Tops		9 60	
4907	25	1	Rug		10 00	
2000		5	Doz Napkins	3 75	18 75	

January 1913 L.|2280

Italian Restaurant,
S. E. Cor. 3rd & Alder Sts.
City.

Dec			Forward			1058 80
6305	27	4	Rockers)			
		1	Settee)			
		1	Table)			
		2	Chairs)			
		1	Table)			123 00
4907		3	Rugs	for	4 00	
		1	W Rug		5 00	9 00
4907		13-2	3 Yds V Carpet	2 00	27 34	
		20	S Pads	25	5 00	
		1	Sweeper		5 25	37 59
542		1	Cabinet			4 50
2000	28	6	Table Cloths	2 25	13 50	
		3	" Pads	1 25	3 75	17 25
2000		½	Dz C Sacks	1 20	60	
		6	Dz Towels	35	2 10	2 70
4712		3	Cushions as per Agreement			15 00
4907		24¼	Yds Linoleum	1 80		43 65
Jan						
4907	3	10	Yds Canvas	65		6 50
4712	6	1	Venetian Shade for)			
			Stair Landing)			12 50
						L|2280

January 1913.

Italian Restaurant,
S. E. Cor. 3rd & Alder Sts.
City.

	Dec				
2000	26	1 Dz Table Pads			9 00
2000		2 Table Cloths	2 25	4 50	
		1 Table Pads		1 50	
		5 Dz Towels	1 40	7 00	
		1 " "		3 00	
		1 Table Pad		1 15	17 15
4712		4½ Yds Velour	1 85	8 33	
		Labor Making 1 Single Portier		1 50	
		7′ Brass Pole	20	1 40	
		2 Pr. Sockets	35	70	
		2½ Dz Rings	35	88	12 81
4712		1 Pr Portiers as per Estimate		25 00	
		12-5|6 Yds Velour	1 85	23 75	
		Labor Making 1 Pr Portiers		2 75	51 50
4712		8 Windows with V Shades & Over-Drapes	28 95		231 60
4712		1 E Venetian Shade		14 87	
		1 E Pr Drapes		11 00	
		1 E Venetian Shade		14 87	40 74

4712			Treating Walls & Ceiling in Oil by Passil & Fulton as Per Contract			650 00
4712		1	Pr Curtains Valance between as per Estimate		16 00	
		1	Venetian Blind as Per Estimate		12 50	28 50
7102	27	2	Shades to Order			2 10
901		4	Dz D Spoons	3 85		15 40
			Forward			1058 80

December 1912

Italian Restaurant
S E Cor 3rd & Alder Sts
City

Nov						
6303	30	150	Chairs	For		412 50
Dec						
6310	7	12	Tables	4 00		48 00
4907	18	380½	Yds Carpet	1 55	589 78	
		3	Bales Lining	7 00	21 00	
		16	Yds Padding		4 00	
		1	Door Matt		10 00	624 78
901	21	20	Doz Tea Spoons	2 19	43 80	
		6	" Desert Spoons	3 85	23 10	
		1	" Table Spoons		4 37	
		20	Doz Forks	3 35	67 00	
		20	" Knives	3 35	67.00	

	2	Oyster Forks	2 99	5 98	
	2	Steak Knives	3 00	6 00	
	3	Pr Carvers	1 60	4 80	
	27	Sugar Bowls	2 75	74 25	296 30
901	3	Meat Covers	3 75	11 25	
	2	" "	4 75	9 50	
	1	" "		6 00	
	6	Soup Tureens	1 75	10 50	
	3	" "	2 21	6 63	
	6	Coffee Pots	2 34	14 04	
	2	" "	2 92	5 84	63 76
2000	48	Table Cloths	1 05	50 40	
	48	" "	1 25	60 00	
	60	" Tops	80	48 00	
	60	" "	32	19 20	
	50	Doz Napkins	3 50	175 00	352 60

L 2280. Conditional Sale. From Meier & Frank Company to Italian Restaurant Co., Third and Alder. $100.00 on 5th. Dated November 26th, 1912.

Filed Oct. 4, 1913.

A. M. CANNON,
Clerk U. S. District Court.

[Trustee's Ex. B.]

Re:
Italian Restaurant Co
Meier & Frank Co.

July 1, 1913.

Portland,
Oregon. **Attention Credit Dept.**

Gentlemen:

The Trustee has completed an inventory of the property of the Italian Restaurant Co., and amongst the property inventoried by him as belonging to the estate are various goods sold to the Italian Restaurant Co. by your firm.

I understand that these goods are claimed by you under a conditional contract, but as it is very questionable whether the property can be held under your conditional contract, the Trustee is claiming the property and taking possession of the goods as the property of the estate. If, however, you desire to maintain your claim to the goods, I would suggest that you make a demand for them before the Referee without delay, so that the ownership of the same may be settled.

I have endeavored to see Mr. Joseph, your Attorney, at the suggestion of Mr. Kiernan, but have been unable to get in touch with him. I am accordingly sending him a copy of this letter.

Yours truly,

T|C Sidney Teiser,
Atty. for Trustee.

c|c Mr. Joseph, Atty.

Filed Oct. 4, 1913.

A. M. CANNON,
Clerk U. S. District Court.

[Trustee's Ex. C.]

In the District Court of the United States for the District of Oregon.

Testimony.

In the Matter of

ITALIAN RESTAURANT COMPANY,

A Bankrupt.

At a Court of Bankruptcy held July 14, 1913, at 3:30 o'clock P. M. before Chester G. Murphy, Referee in Bankruptcy, Fenton Building, Portland, Oregon, the following appearances were made:

Trustee by counsel, Mr. Sidney Teiser.

C. V. Everett, President of Clifford Investment Company, represented Clifford Investment Company, a creditor.

Creditors in person and by counsel, George W. Joseph.

Mr. A. E. Gebhardt represents petitioning creditors.

W. E. KIERNAN, sworn, testified as follows:

Questions by Mr. JOSEPH:

Q. What is your occupation?

A. Credit officer Meier & Frank Company.

Q. How long have you been there?

A. Two and a half years.

Q. Are you acquainted with the Italian Restaurant matter?

A. Yes, sir.

Q. Were you acquainted with the officers of the

company at the time the agreement was made concerning the purchase of some property?

A. Yes, sir.

Q. Have you a copy of the agreement which was entered into at that time?

A. I have the original.

Q. The original? All right, just offer that in evidence.

Thereupon original Conditional Sales agreement was offered in evidence and for identification marked

CREDITORS EXHIBIT A.

Q. Between whom were the negotiations had which lead up to the execution of the agreement?

A. Individuals?

Q. Yes.

A. Between Meier and Frank and Mr. Everett and Mr. Montreza, that is all.

Q. And who represented the Meier and Frank Company in those negotiations?

A. I did.

Q. What was the understanding or agreement?

A. When Mr. Everett came to me he wanted to—the original—he wanted to—us to furnish the decorations, and we talked then about the terms and his first agreement was, arrangement was to have $1500.00, $750.00 was to be cash.

Q. $1500 credit?

A. Yes, credit. $750.00 was to be cash, $600 of that $1500.00 was to be for the frescoing of the room

which was to be done by an outside contract. In other words of $900.00 we got $160.00 cash and the rest was to be paid $100.00 a month.

Q. Do you mean to say they advanced some money at that time?

A. Meier and Frank did.

Q. How much?

A. $600.00.

Q. To whom did they pay that money?

A. I don't know the name.

Q. They paid it to some third party?

A. We paid—charged to Meier and Frank—

Q. Paid this to a third party for the decorations?

A. Yes.

Q. In the Italian Restaurant?

A. We made no profit on that at all.

Q. Were you paid something on the account?

A. At that time yes, $150.00 on the $900.00.

Q. What were the total purchases under that account?

A. Afterwards it was, they wanted some goods, and we kept on asking for money, one fourth down, on November 26th they paid that, and on December 21 they bought more, purchased $1041.00 and paid $250.00 down, and they bought subsequent articles, when they paid $1223.90.

Q. That all?

A. That $1223.90 was the total amount paid before, at the time they made this purchase.

Q. Made before they made the purchases?

A. No, after they paid $1223.90, there was no other purchase. That—

Q. What were the total purchases?

A. $3129.33.

Q. What were the total payments?

A. Subsequent to this?

Q. The total payments.

A. $1564.60.

Q. Were those purchases all on one account?

A. Yes.

Q. What account?

A. We had two accounts with them.

Q. I am asking you about this one account.

A. Contract account.

Q. How have you, them marked to distinguish?

A. All contracts marked "L" stands for lease.

Q. What number?

A. 2280.

Q. In addition to this account, do you have any other account?

A. We had an open account for them.

Q. Was that a conditional account?

A. No, open account.

Q. Were any of the goods which were purchased on lease account charged to open account?

A. No.

Q. Were all the goods purchased on lease accounts purchased conditionally?

A. They were.

Q. On what condition?

A. On the condition they were to pay $100.00 a month.

Q. Under this contract?

A. Under this contract.

Q. You have inserted in here an approximate amount of $1500.00, was it not a fact that the conditional sales, the items of the conditional sales, did not exceed $1500.00 net value?

Mr. TEISER: I object to that question on the grounds that the written contract is the best evidence and any attempt to vary it by parole is improper.

Mr. MURPHY: The objection is well taken. I sustain the objection.

Mr. JOSEPH: Well, then, there is no need of us going any farther; we will merely have to commence an action—of course if you sustain the objection, that stops it.

Mr. MURPHY: I will have to sustain the objection. You are attempting to change the terms of a written contract. You say you sold them $1500.00 worth of goods and admit you have been paid $1500.00.

Mr. JOSEPH: At the time this contract was made, these goods were not here, and were purchased after November; it was understood these goods were attached to the contract.

A. Nine tenths of our contracts are done the same way.

Mr. JOSEPH: I don't think you could prove it in a court of bankruptcy, or any court. Not good

business.

A. Some of the goods were billed to Cappa, that was just for, I don't know—let's see that bill.

Mr. MURPHY: I would like some explanation.

A. That is just an error. I don't know how that was.

Mr. MURPHY: Who was D. L. Cappa?

A. You see, Mr. Murphy, there is a ledger number. A ledger number couldn't have two accounts for the same party.

Mr. JOSEPH: What was Mr. Cappa's position over there?

Mr. GEBHARDT: He was steward and manager of the Italian Restaurant.

Mr. MURPHY: I will sustain the objection.

(Witness excused.)

Filed Oct. 4, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 18 day of October, 1913, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

[Petition for Appeal.[

In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy of the Estate of Italian Restaurant Company, a corporation,
Plaintiff,

vs.

MEIER & FRANK COMPANY, a corporation,
Defendant.

The above named defendant, conceiving itself aggrieved by the order and decree herein made and entered on the 10th day of October, 1913, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit.

JOSEPH & HANEY,
Attorneys for Defendant.

Dated, October 18th, 1913.

ORDER OF ALLOWANCE.

The foregoing appeal as prayed for, is allowed, and the bond on appeal, as security for costs, is fixed in the sum of $500.00.

R. S. BEAN,
District Judge.

Dated, Oct. 18, 1913.

[Endorsed]: Petition for Appeal and Order of Allowance. Filed Oct. 18, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 18 day of October,

1913, there was duly filed in said Court, Assignments of Error in words and figures as follows, to wit:

[Assignments of Error.]

In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy of the Estate of Italian Restaurant Company, a corporation,
Plaintiff,

vs.

MEIER & FRANK COMPANY, a corporation,
Defendant.

And now on the 18th day of October, 1913, comes the said defendant, by Joseph & Haney, its attorneys, and says that the order and decree entered in said cause is erroneous and against the just rights of said defendant, for the following reasons

First: Because the evidence showed that the conditional contract of sale, or lease contract, between defendant and the Italian Restaurant Company, was indefinite and uncertain, so far as the written contract was concerned.

Second: Because the evidence showed clearly and distinctly, and was not impeached or discredited, that there had been a full and complete intent and understanding had between the parties to this contract, that all of the goods purchased from the defendant by the Italian Restaurant Company was to be under and by virtue of a conditional sale, title thereto to remain

in the defendant until full payment had been made.

Third: That in the face of its decision that there was no completed written contract as to the sale of these goods, the court erred in disregarding the oral proof as to the intent, meaning and understanding of the parties with regard to the effect of this sale, where the writing is indefinite and uncertain.

Fourth: Because the evidence showed that the sale of these goods amounted to and was in fact a conditional sale or lease contract, with title to said goods vested in defendant.

Fifth: That the court erred in holding and decreeing that there was no valid conditional sale, or lease contract, with respect to the goods in question.

Sixth: That the court erred in not holding and decreeing that the defendant was entitled to the possession of these goods, and in granting a decree for plaintiff, as prayed for by him.

WHEREFORE the said defendant prays that the said decree be reversed, and that the said court may be directed to enter a decree in accordance with the prayer of the defendant.

JOSEPH & HANEY,
Attorneys for defendant.

[Endorsed]: Assignment of Errors. Filed Oct. 18, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 20 day of October, 1913, there was duly filed in said Court, a Bond

on Appeal, in words and figures as follows, to wit:

[Bond on Appeal.]

In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy of the Estate of Italian Restaurant Company, a corporation,

vs.

MEIER & FRANK COMPANY, a corporation,

KNOW ALL MEN BY THESE PRESENTS: That we, Meier & Frank Co., Leon Hirsch and W. E. Kiernan are held and firmly bound unto R. L. Sabin, Trustee in Bankruptcy of the Estate of the Italian Restaurant Company, a corporation, in the sum of Five hundred dollars, to be paid to the said R. L. Sabin, his executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated October 20, 1913.

Whereas the above named Meier & Frank Company, a corporation, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit,, to reverse the decree in the above entitled cause by the District Court of the United States for the District of Oregon.

Now, therefore, the condition of this obligation is such, that if the above named Meier & Frank Com-

pany, a corporation, shall prosecute said appeal to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Signed, sealed and delivered in presence of

MEIER & FRANK CO.
by J. L. Meier, V. P.
LEON HIRSH.
W. E. KIERNAN.

B. H. GOLDSTEIN.

Approved Oct. 20, 1913.

R. S. BEAN,
Judge.

[Endorsed]: Bond on Appeal. Filed Oct. 20, 1913.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 20 day of October, 1913, there was duly filed in said Court, a Citation on Appeal, in words and figures as follows, to wit:

[Citation on Appeal.]

UNITED STATES OF AMERICA,
District of Oregon,—ss.

To R. L. Sabin, Trustee in Bankruptcy of the Estate of the Italian Restaurant Company, a corporation, plaintiff, and Sidney Teiser, his attorney, Greeting:

Whereas, Meier & Frank Company, a corporation, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree ren-

dered in the Circuit Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 20th day of October in the year of our Lord, one thousand, nine hundred and thirteen.

R. S. BEAN,
Judge.

[Endorsed]: Citation on Appeal. Filed Oct. 20, 1913.

A. M. CANNON,
Clerk U. S. District Court.

State of Oregon,
County of Multnomah—ss.

Due service of the within citation on appeal is hereby admitted in Multnomah county, Oregon, this ..... day of October, 1913, by receiving a copy thereof, duly certified to as such by B. E. Haney one of attorneys for defendant.

SIDNEY TEISER,
Attorney for plaintiff.

And afterwards, to wit, on Tuesday, the 18 day of November, 1913, the same being the ..... Judicial day of the Regular November Term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Transcript.]

In the District Court of the United States for the District of Oregon.

No. 6117

November 18, 1913.

R. L. SABIN, Trustee in Bankruptcy of the Estate of Italian Restaurant Company, a corporation,

Plaintiff,

vs.

MEIER & FRANK COMPANY,

Now, at this day, for good cause shown, it is Ordered that defendant's time for filing the record and docketing the above entitled cause on the appeal, in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby, extended sixty (60) days from the date hereof.

CHAS. E. WOLVERTON,

Judge.

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

MEIER & FRANK COMPANY, a Corporation,
Appellant,

vs.

R. L. SABIN, as Trustee in Bankruptcy of Italian Restaurant Co., a Corporation.
Appellee.

Appeal from the District Court of the United States for the District of Oregon.

Appellant's Brief.

STATEMENT

This is a bill in equity to determine the rights of the parties hereto in and to certain personalty in possession and custody of the appellee, as Trustee in Bankruptcy of the Italian Restaurant Co., a bankrupt.

The amended bill of complaint alleges that on

May 19th, 1913, a petition in involuntary bankruptcy was filed in this court against the Italian Restaurant Co.; that it was thereafter duly adjudged a bankrupt; that an order of reference therein was made to Chester G. Murphy, a Referee in Bankruptcy, and that on June 24th, 1913, at the first meeting of the creditors, the appellee, R. L. Sabin, was elected Trustee of said bankrupt's estate; that appellant Meier & Frank Co. filed a petition and claim for the recovery of certain personalty; that the Trustee objected to the allowance of said claim; that a hearing thereon was duly had, and that the Referee decided against the validity of said claim, and ordered said property to be held as the property of the Estate by the Trustee. That thereupon the Trustee offered said personalty for sale and the same was bid in by one J. T. Wilson, which bid was accepted and approved by the Referee. That notwithstanding the determination of the question of the ownership of said property, the appellant Meier & Frank Co. brought an action in the State Court against said J. T. Wilson for the recovery of said property. That by reason of said suit, the said J. T. Wilson refuses to receive the property. That the action of said Meier & Frank Co. has had the effect of depreciating the value of the property, and has created a cloud upon the title thereto. Wherefore this Trustee prays that this Court may determine the rights of the parties hereto in and to said property.

The answer of Meier & Frank Co. denies that it at any time filed a claim or petition with the Referee for the recovery of said personalty; denies that any hearing thereon was had; denies that the Referee decided against the validity of said claim, and further denies that the claim to said property by Meier & Frank Co. is or ever was adjudicated as between it and the Trustee in Bankruptcy. The answer also denies that the action against Wilson was brought after a determination of the question of ownership of said property by the Referee, but avers that no determination of the merits was ever had, and that the sale to Wilson had been confirmed. The answer further denies that the title to said property was ever in the Bankrupt or the Trustee of said Bankrupt's estate.

Upon the trial of this cause before Hon. C. E. Wolverton, District Judge, said Court held that there had not been a res adjudicata in this case, and that the rights of the parties in and to said personalty had not been determined before the Referee. The Court however held that Meier & Frank Company were not the owners of this property as against the Trustee, and a decree was thereupon entered confirming and settling the title thereto in said Trustee. From this decree, the appellant, Meier & Frank Company, has appealed to this Court.

Briefly, Judge Wolverton, in his decision, ruled that the written conditional sale covering this per-

sonalty, as an indication of the title thereto in said Meier & Frank Company was indefinite and uncertain, in that it did not have attached thereto, a full and complete list of the property to be covered thereby, and that therefore there was never a completed written contract as to the sale of this personalty. That while this contract, and what verbal contract might be made as to additional goods, possibly might be good as between the parties, yet it is void as against creditors in bankruptcy, who take as bone fide purchasers. That a written account cannot be supplemented by a verbal account as to affect said creditors, and that therefore title to said personalty is in the Trustee, as against the Meier & Frank Co.

In its assignments of error submitted by the appellant, the Meier & Frank Company, it is contended:

(1) That where a written conditional sale is indefinite and uncertain and where it is uncompleted, oral testimony is admissable to prove the intent, meaning and understanding of the parties with regard to the effect of such sale.

(2) That the evidence in this case showed clearly and distinctly, and was not impeached or discredited, that there had been a full and complete intent and understanding had between the parties to this contract, that all of the goods purchased under said contract from Meier & Frank Co. by the bankrupt, the Italian Restaurant Co., was to

be under and by virtue of a conditional sale, title thereto to remain in the Meier & Frank Co. until full payment had been made.

(3) That the evidence showed that the sale of these goods amounted to and was in fact a conditional sale, with title to said goods vested at all times in the Meier & Frank Company.

(4) That the court erred in holding and decreeing that there was no valid conditional sale with respect to these goods, and in holding and decreeing that the Meier & Frank Company was not entitled to the possession of these goods.

POINTS AND AUTHORITIES.

I.

A "conditional contract of sale" is a contract for the sale of property, real or personal, in which the transfer of title to the property sold to the purchaser, or his retention of it, is made dependent upon the performance of some condition. No title passes until such condition is performed. As to whether the sale is absolute or conditional depends upon the intention of the parties to the contract.

Isaacs on Conditional Sales in Bankruptcy, P. 1.

No particular form of instrument is necessary to create a conditional sale. It may be in the form of a lease or note. It has indeed been held that no express declaration as to the reservation of title is

necessary, but that reservation may be implied and that it is really the intent of the parties that must govern.

35 Cyc. 662.
Rodgers vs. Bachman, 42 Pac. 448.

The contract under which these goods were delivered was one of conditional sale.

Singer Mfg. Co. v. Graham, 8 Ore. 17.
McDaniel v. Chiarmonte, 61 Ore. 406.
Harkness v. Russell, 118 U. S. 663.
Bierce v. Hutchins, 205 U. S. 340.
Bryant v. Swofford Bros., 214 U. S. 279.

II.

In an action in a Federal Court, the construction and validity of a conditional sale will be determined by the local laws of the State.

35 Cyc. 666.
Loveland on Bankruptcy, 4th Ed. p. 837.
In re Tice, 139 Fed. 52.
York Mfg. Co. v. Cassell, 201 U. S. 352.
Bryant v. Swofford Bros., 214 U. S. 379.
Hewit v. Berlin Mach. Works, 194 U. S. 296.

III.

In the absence of statute, a conditional sale to be valid need not be reduced to writing, or recorded.

35 Cyc. 663.
Blackwell v. Walker, 5 Fed. 419.
Benner v. Puffer, 114 Mass. 376.

Parker v. Payne, 48 So. Rep. 835.

IV.

In the State of Oregon, an oral conditional sale is valid as to all the world. The statute only requires such contracts to be in writing and recorded, where they cover **fixtures** so attached to **real estate** as to become a fixture thereto. Other than this exception, no conditional sale of personalty is necessary to be in writing or recorded, in order to be valid.

Sec. 7414 L. O. L.

Singer Mfg. Co. v. Graham, 8 Ore. 17.

V.

A contract for the sale of personalty is none the less a conditional sale, because it is to include after acquired property or goods not in existence at the time of the execution of such contract, provided the goods were thereafter delivered and accepted under said contract. The parties can stipulate as they see fit as to the nature and construction of such agreement.

Bierce v. Hutchins, 205 U. S. 340.

Benner v. Puffer, 114 Mass. 376.

Collerd v. Tully, 77 At. Rep. 1080.

Stoll v. Sibson, 56 At. Rep. 710.

Cumberland Nat. Bank v. Baker, 40 At. Rep. 853.

VI.

The Trustee in Bankruptcy now takes the

estate of the bankrupt, clothed with the rights, remedies and powers of a lien creditor and a judgment creditor.

Bankruptcy Act of 1898, Sec. 47-a, as amended by the Act of June 25, 1910, Sec. 8.

Loveland on Bankruptcy, 4th Ed. P. 767.

Whether property in the possession of a bankrupt under a conditional sale, by which the title is reserved by the vendor until the property is paid for passes to the trustee, depends upon whether the arrangement with regard to such property is valid under the law of the state in which sale is made as against a creditor holding a lien by legal or equitable proceedings thereon.

Loveland on Bankruptcy, 4th Ed. P. 837.

In re Franklin Lbr. Co., 187 Fed. 281.

If the arrangement between the vendor and the vendee is valid under the state law as to such lien creditors, it will be sustained in bankruptcy.

Loveland on Bankruptcy, 4th Ed. P. 839.

VII.

The proceeding before the Referee in Bankruptcy was not an adjudication or determination of the rights of the parties to this property. The proceeding to reclaim property is plenary and formal in its nature—it requires the filing of a verified petition, the joining of issue by answer of Trustee, the setting down for hearing and trial,

and the entry of an order determining the rights of the parties, neither of which was done. The Referee cannot determine such rights by summary proceedings—without the voluntary submission of the controversy to him for settlement and without the consent of the claimant.

Loveland on Bankruptcy, 4th Ed. P. 852.

ARGUMENT

This is a bill in equity to determine the respective rights of the parties in and to certain personalty sold and delivered by Meier & Frank Company, to the Italian Restaurant Company, a corporation, as between said Meier & Frank Company and the Trustee in Bankruptcy of the Estate of said Italian Restaurant Company, a bankrupt. This sale was made and consummated in the City of Portland, State of Oregon. Title in and to said property is claimed by Meier & Frank Company, by virtue of a certain contract of conditional sale entered into by and between it and the Italian Restaurant Company on November 26th, 1912, under which contract said goods in controversy were sold and delivered to said Italian Restaurant Company, now bankrupt. On May 19th, 1913, a petition in involuntary bankruptcy was filed against the Italian Restaurant Company, which was thereafter duly adjudicated a bankrupt, and R. L. Sabin elected as Trustee of said estate. Among the property of the bankrupt coming into the hands of said Trustee, was the personalty in

controversy, title to which it is claimed was vested in said bankrupt, on the ground that the sale thereof from the Meier & Frank Company was an absolute sale, or at least that any reservation in title therein was void as against said Trustee.

It may be stated then, that the crux of this controversy, is whether or not the goods enumerated and designated herein are covered by a conditional sale, and if so, its effect and validity against a Trustee in Bankruptcy.

I.

The Meier & Frank Company, a corporation, owns and conducts a large department store in the City of Portland, Oregon, and as such, deals extensively in the sale of furniture and housekeeping goods, and in generally outfitting homes, restaurants, etc.

On or about November 26th, 1912, the Italian Restaurant Company, represented by Mr. Everett and Mr. Pearson, its officers, called upon the Credit Man of Meier & Frank Company, a Mr. Kiernan, for the purpose of making arrangements regarding credit, the said company desiring and intending to completely outfit a restaurant which it was about to open in the City of Portland. All of the negotiations which led up to the making of this contract in controversy were entered into and made by Mr. Kiernan, representing the Meier & Frank Company, and Messrs. Everett, Pearson and Montrezza, representing the Italian Restaurant

Company. It was understood and agreed by and between the parties that the complete outfitting of this restaurant was to be done by the Meier & Frank Company, but that the title to all of said property was to remain in said company until full payment thereof had been made.

At the time such negotiations were pending, it was of course impossible to ascertain with any exactness or certainty the full value of the goods to be thus furnished, but at said time, it was estimated and approximated that the cost would be about the sum of $1500. We desire to point out, that so far as the terms of the contract were concerned, at the time it was entered into, they may be briefly summarized as follows: The vendor contracted to completely furnish and outfit vendee's restaurant; title thereto was to at all times remain in the vendor until fully paid; payments were to be made in installments of $100 per month; the goods were to be delivered as required and until the restaurant had been completely furnished and outfitted; that as deliveries were made, the items were to be invoiced and attached to the agreement; that the true consideration was to be the total purchase of all of such goods, as fixed and determined by the total of all of such items as invoiced. Such in brief was the agreement, as testified to by Mr. Kiernan, and which stands alone, unimpeached and uncontradicted. It is true that at the time they entered into this agreement, they estimated the total cost of the furnishing and

outfitting to be in the sum of $1500, but as the work of preparation went on, as goods were being delivered, the vendee ordered additional or more valuable goods until the total of something like $3000 was reached, but at all times, it was the express stipulation and agreement of the vendee, that all of such goods were received under the terms of the contract of conditional sale. And we therefore submit to this Court that if such be the agreement of the parties, and it stands undisputed, it should, in all fairness and justice, prevail.

It was only upon this clear understanding as to reservation of title, that a written memorandum of contract of conditional sale (Trustees Exhibit A) was entered into, by and between these parties, which reads, in part, as follows:

> "In consideration of the payment to it of the sum of $1500, by purchaser as hereinafter provided, the seller hereby promises and agrees to sell and transfer unto the purchaser all of the personal property, described in the list hereto attached and marked 'Exhibit A,' which is hereby made a part hereof.
>
> * * * *
>
> "It is expressly understood and agreed that the title to said property shall remain in the seller until each and all of the payments hereinbefore mentioned shall have been made by such purchaser, and that if at any time said seller shall take possession of said property, as

hereinbefore provided, then in such event any amount or amounts of money paid by said purchaser, under this agreement, on said property, shall be considered as payment for the use of said property by the purchaser, and the purchaser shall have no claim against the seller on account thereof, and in case any action or proceeding at law is instituted by the seller herein to secure the possession of said property, or any part thereof, or to collect any amount becoming due thereunder, then and in such event the purchaser herein promises and agrees to pay such sum as the Court may adjudge reasonable as attorney's fees in such action or proceeding."

At the time this contract of conditional sale was entered into and executed, no Exhibit "A" was attached, it being expressly understood, as stated, that such Exhibit "A" was to consist of the invoices of such goods to be thereafter delivered to the Restaurant Company, as required, all of which deliveries, in the future, were to be made by virtue of and under this written contract of conditional sale, and it was expressly agreed and understood that title thereto was to at all times remain in the vendor.

The Court below, in its opinion, held that this written contract was indefinite and uncertain, by reason of the fact that it did not have attached thereto Exhibit "A" which would identify the

goods to be covered by this contract. Assuming, then, for the moment, that the Court's interpretation of this instrument is correct, surely there can be no question but that parol testimony is admissable and proper to ascertain the true intention of the parties where the contract is ambiguous or uncertain. And the intent of the parties is always the controlling element in transactions of this kind.

A conditional sale is where it is agreed that until the price is paid, the title is to remain in the vendor. To constitute a conditional delivery, it is not necessary that the vendor should declare the condition in express terms at the time of delivery. It is sufficient if it can be inferred from the acts of the parties and the circumstances of the case that it was intended to be conditional. No particular words or terms of expression are necessary for the creation of a conditional sale. Any words which indicate an intention to annex a condition to the sale will be sufficient. (McManus v. Walters, 61 Pac. 686.)

And what does the testimony in this case show to be the intent of the parties as to the terms and conditions of this sale; and more particularly, as to the title to the goods in controversy? It is admitted that the only parties who might know of the negotiations leading up to the making of this contract, the terms and conditions under which these goods were delivered, and the parties who

executed the written instrument, expressing the intention of the parties, are Mr. Kiernan, on behalf of the vendor, and Messrs. Everett, Pearson and Montrezza, on behalf of the vendee. At the trial of this case, in support of the Trustee's contention that these goods are not covered by a conditional sale, the testimony is absolutely barren of any proof whatsoever bearing upon this most important point, but it may be stated, that the Trustee relied for his relief solely and entirely upon an alleged adjudication of the merits in controversy before the Referee in Bankruptcy, which as before stated, the learned Court below, decided the testimony did not substantiate. Not one of these three gentlemen, Messrs. Everett, Pearson or Montrezza, appeared before the Court to say that these goods were not covered by a conditional sale, and this, notwithstanding the importance of such testimony, if such was the true fact, as claimed by the Trustee. Their absence at this trial, when their presence could have been secured, is absolutely convincing, in our opinion, of the nature of the transaction, under which these goods were secured.

On behalf of the vendor, Mr. Kiernan was called as a witness, and his testimony is clear and evident that the title to these goods was at all times vested in the vendor, only to be divested upon payment of the full purchase price, and that this was not done; that the transaction was a conditional sale, and included these goods deliver-

ed subsequent to the making of this contract.

It might be well at this time to point out certain extracts of Mr. Kiernan's testimony adduced at this trial, bearing upon the question of intention of the parties, which it must be conceded, is always controlling in transactions of this kind:

Q. Who else did you deal with representing the restaurant company except Mr. Pearson?

A. I talked to Mr. Everett—C. V. Everett, and I talked to Mr. Pearson, was the only ones I talked to—Mr. Everett, Everett and Pearson were the prime movers in it. And Montrezza signed this for me, the secretary. I went to their office and had it signed up.

Q. There has been something said about what Schedule "A" was, referred to in this contract.

A. They are the itemized bills of the purchases. They are taken directly from the sales-checks.

Q. At the time that contract was signed, I mean, at the identical date the signatures were affixed, was there any Schedule "A" there at all?

A. There was not.

Q. Was there anything affixed to it marked "A"?

A. There was not. There never was on the three thousand contracts we have, it has

never been done. It is impossible to do it.

Q. But the agreement was that all of the goods purchased, as furniture and crockery, by the Italian Restaurant Company, was to be under a lease contract?

A. Absolutely.

Q. Otherwise, would you have given them that much credit?

A. We wouldn't have given them any credit.

Q. Did they have anything to give them credit on?

A. They didn't have anything to give them credit on. As a matter of fact, their credit having been without taking title to the property, it was so perishable, the nature of it, that I insisted upon Mr. Pearson guaranteeing the payment of it, and also Mr. Everett, personally. Aside from being officers of the company, they had to sign it personally.

(Transcript of Record, pp. 34-35.)

* * * *

Q. I will ask you, Mr. Kiernan, whether any of the other creditors knew that this property was held down there under a lease-contract by the Restaurant Company?

A. Every credit man in the city of Portland selling them must have known that, because different mercantile agencies knew it. That is, several creditors called us up—for in-

stance, several of the stores around town called us up, and asked us about our dealings with them. Of course, they knew we were putting the goods in there. They wanted to know how we were selling them. We told them all under contract.

(Transcript of Record, pp. 36-37.)

* * * *

Q. Now, you say that all these goods were gotten at the same time?

A. Delivered at the same time, yes.

Q. Delivered at the same time?

A. Yes.

Q. And they were delivered about the 28th day of December?

A. Yes, sir. They were trying—they were making herculean efforts to get that through by the first of the year. They wanted to open the first of the year.

Q. All of it was on the contract?

A. Every bit of it, absolutely.

Q. And was understood at the time?

A. Absolutely.

Q. And all the goods were chosen by the 28th of course, had to be, if it was delivered by then?

A. Yes, sir.

Q. Will you explain why goods amounting to $1369.72 were dated January?

A. Yes, because we close our books, don't

you see—we closed our books in December—I should imagine we closed our books on December 26th.

Q. So from December 27th on, you would date it——

A. January, yes.

Q. January?

A. Yes. The same as you get your bills. We advertise, don't you see, all purchases for the last five days of the month go on the next month's bill.

Q. Well, now, will you explain the goods purchased on January 28th—I mean, December 28th, January 3-6-10 and 25? How is that on the same bill?

A. What is that, now?

Q. Why are the goods shipped on the 28th, or purchased on the 28th of December, January 3-6-11 and 25 on that bill, if they were sent on the 28th?

A. Because I have explained to you we close our books on the 26th, and all purchases made from the 26th appear on your January bill.

Q. Is that the reason why goods purchased on January 3rd and 6th, for instance, were sent on December 28th?

A. No, they were actually purchased on these dates.

Q. They were purchased on those dates?

A. Yes, sir.

Q. How did you get that in the conditional contract, if all the goods under the conditional contract were sent on the 28th?

A. Because it was our understanding that every thing they might buy in the furnishing up of this place was to go on conditional contract.

(Transcript of Record, pp. 50-52.)

* * * *

Q. This contract of lease is dated the 26th day of November?

A. Yes, sir.

Q. And about all these goods, nearly all of them, were delivered about the 28th day of December?

A. All within two days.

COURT: That is more than one month after this contract was signed.

A. Yes, your Honor, because they were engaged in cleaning up.

(Transcript of Record, p. 61.)

* * * *

Q. Mr. Kiernan, there has been brought out here, this contract was signed on the 26th day of November, and this contract says you have sold goods "described in the list hereto attached and marked Exhibit 'A.'" Was that list ever attached to this contract?

A. Yes, they are always.

Q. Which is the list?

A. It becomes a copy of our bills. Every contract, there is an original bill goes to the customer—sometimes you get your bill on the first of the month; then there is a duplicate which goes in a binder, which are kept there, which are permanent records of the store, and a triplicate goes on here.

Q. Was that list attached with the concurrence and consent of the buyer?

A. Of the people signing it, yes, because a great many people say, for instance, sometimes we leave this blank, and they say "Well now, how about this figure?" "Well," we say, "We only ask you to pay for what is afterwards attached," you see, to their bill.

Q. That leaves it with the seller to fix his own Exhibit A, and attach it thereto, and thereby it is made part of the contract?

A. He understands, your Honor, that is just going to be a duplicate of his purchases.

(Transcript of Record, pp. 61-62.)

Aside from the written instrument itself, this testimony given by Mr. Kiernan at the trial of this case, is all that was presented from which to determine the intention of the parties as to the nature of the transaction—the circumstances under which it was entered into and the conditions under which the goods now in controversy were delivered. Mr. Kiernan's statement, standing as

it does, unimpeached and uncontradicted, must be deemed as admitted, and true. We therefore contend that it is decisive of the merits in this case.

In this connection, we desire to call the attention of the Court to the case of **Benner vs. Puffer, 114 Mass. 376,** a case somewhat similar to the one in issue. Here the plaintiffs, who were dealers in furniture and housekeeping goods, made a parol contract with one Mead, by the terms of which they were to furnish said Mead with furniture and housekeeping goods, half of the purchase money to be paid down and the rest from time to time as Mead was able to pay it. The articles furnished were to remain the property of the plaintiffs until the last cent of the money due on them was paid. The plaintiffs furnished goods under this contract from time to time, amounting to $1149, payments being made during said period to the amount of $850. The plaintiffs claimed the goods by virtue of a breach. Upon the trial, the defendants contended that the contract was illegal, because it covered the sale of articles not present or delivered, and which the plaintiffs did not own or possess at the time. The court held that the rule that the sale of goods not in existence or which did not actually or potentially belong to the vendor at the time is void has no application to this case as presented by the facts. That it is immaterial whether the plaintiffs had them at the time of the contract or not, the goods having been deliver-

ed and accepted by Mead under the contract. The conditions of the contract attached to them upon delivery and Mead held them on condition that the property should remain in the plaintiffs until the purchase money due under the contract was paid. The conditions having not been fulfilled, no title to the goods passed to Mead and he could not give a valid mortgage to the defendants.

It was clearly the intention of the parties in this case to pledge all of the enumerated property as ascertained from the duplicate invoices, and made a part of Exhibit "A," attached to this contract. It appears from the authorities that a conditional sale does not have to be in any particular form, and that it may include any property that a purchaser may afterwards acquire if such be the express stipulation and agreement of the parties. That it is only in cases where a conditional sale is required to be in writing in order to be valid, that, so far as after-acquired property is concerned, it must indicate such property clearly enough to enable one to determine what property is meant, and even then this result is accomplished if the language used puts one on inquiry in such a way as to necessarily lead to knowledge of the property intended to be conditionally sold. As to such after-acquired property, the rule is that the contract will be held to extend to such property. After-acquired property clauses have been held sufficient where they cover "all property purchased

in replenishment of stock," "all property purchased in addition to the present stock," and other like descriptions. In each of these cases it will, of course, be observed that testimony, de hors the instrument was required to identify the property. The principles involved, and applications thereto, will be found in the following cases: (Collerd v. Tulley, 77 At. Rep. 1080); (Stoll v. Sibson, 56 At. Rep. 710). The reasoning of the courts in these cases proceeds upon the idea that the contract is a continuous agreement, operating as a power and perfecting the interest of the creditor, as soon as the entire act is done in the nature of an execution of a power. (Cumberland Nat. Bank v. Baker, 40 At. Rep. 853.)

The circumstances in this case bear out our contention that this written contract was not to cover goods sold prior to or upon the execution of written memoranda, but to cover and include goods sold and delivered in the future, and that the sum of $1500 was not the true consideration of this contract, but was merely an estimate of such, it being expressly understood and agreed that the total value of the goods furnished by vendor in outfitting this restaurant, was to stand as such consideration, and that the reservation of title in vendor included all of such goods. From an examination of the Trustee's Exhibit "A," the list of items attached to said instrument shows that notwithstanding that the agreement was entered

into November 26, 1912, the first substantial delivery was not made until December 28, 1912, thus clearly proving that the intention of the parties was, that such contract was a conditional sale reserving the title in the vendor in after acquired property as well.

In view of all the circumstances in this case, in view of the express stipulation and agreement of the parties, surely their intention is not to be lightly disregarded, but in all fairness and justice, a court of equity should support and sustain it.

II.

Assuming, then, that it was the intention of the parties, as evidenced by the testimony adduced at this trial, that these particular goods in controversy were sold by the vendor to the vendee, under a contract of conditional sale, and assuming further, that the written proof of such contract was insufficient, and that it was entirely an oral agreement, the question to be next determined is whether such an oral conditional sale is valid against the Trustee in Bankruptcy.

It is well known that in the absence of statute, a writing is not necessary to constitute a valid conditional sale (35 Cyc. 663). There surely is nothing in the nature of this contract which would forbid the parties from entering into it if it is valid by the laws of the State where made, and in bankruptcy the construction and validity of such

a contract must be determined by the local laws of the state where made. (Thompson v. Fairbanks, 196 U. S. 516); (Humphrey v. Tatman, 198 U. S. 91.)

It may be stated, without question, that there are no statutes in the State of Oregon which require such a contract of conditional sale to be in writing. It is true that in a number of states, such contracts must be in writing and recorded, in order to be valid as against lien creditors, mortgagees and purchasers for value. And even in states where registration of a conditional sale is necessary, a writing is not necessary as between the parties. (35 Cyc. 663.) So therefore, had this controversy arisen only as between the vendor and vendee, there would be no difficulty in arriving at its determination. Here, however, the Trustee in Bankruptcy of the Estate of such vendee has intervened, and the situation is somewhat different, so far as their relative positions are concerned.

Prior to 1910, the Trustee in Bankruptcy took no better right or title to the bankruptcy property than belonged to his general creditors at the time the trustee's title accrued. Under the Bankruptcy Act of 1898, the trustee is affected with every equity which would affect the bankrupt himself if he was asserting those rights and interests. The Supreme Court, in many decisions on this subject, held, that as between the trustee and the vendor of property sold on conditional sale, such trustee

stands in the place of the bankrupt and that he can take in no better manner than the bankrupt could; that such trustee is not, and can not claim as a subsequent purchaser in good faith as against the vendor; that he is in no sense a lien creditor, and bankruptcy proceedings do not operate as a judicial seizure conferring new and greater rights on the creditors of the bankrupt; that even in a state where conditional sales are valid between the parties, although not filed, the trustee stands in the shoes of the bankrupt. (Hewit vs. Berlin Machine Works, 194 U. S. 296) (York Mfg. Co. vs. Cassell, 201 U. S. 352.)

However, Sec. 8 of the Act of June 25th, 1910, amending Section 47-a of the Act of 1898, provides that "such trustee as to all property in the custody of the bankrupt or coming into the custody of the Bankruptcy Court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon and also as to all property not in the custody of the Bankruptcy Court shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution, duly returned unsatisfied." So, therefore, since this amendment, the position of the trustee has been greatly strengthened. The trustee now stands in the shoes of the bankrupt, clothed with the rights, remedies and powers of a lien creditor and a judgment creditor, instead of a general creditor as before

the amendment. The amendment, in brief, fastened a lien on the property of the bankrupt estate, in favor of the trustee. (Loveland on Bankruptcy, 4th Ed. P. 767.)

Yet, after all, conceding all this, wherein does a lien creditor have any greater rights than the vendee himself, under a contract of conditional sale, made and entered into in the State of Oregon, where such contracts, with but one exception, are not required to be in writing or recorded?

Section 7414 L. O. L. requires only such contracts of conditional sale to be in writing and recorded, where they cover fixtures so attached to real estate, as to become a fixture thereto.

The goods in controversy do not come within this classification, and no contention is made that they do. Outside of this one exception, the recording acts of this State do not require contracts of conditional sale to be in writing or recorded. Acts of recording are intended solely for the benefit of third parties. The real purpose of requiring instruments of this kind to be in writing and recorded is to protect those who from the fact of possession and apparent ownership by the vendee may be led to believe him to be the actual owner of the property held by him under an agreement of conditional sale. But such protection is purely statutory, and while it may be considered inequitable, unjust and unfair to third parties who might suffer by the absence of such a protecting statute,

yet if the people of this State have not seen fit to incorporate it in our laws, we surely cannot make up for their omission by endeavoring to impress it upon our statute books to meet the exigencies of this case. If this is a conditional sale, if title is still vested in the vendor, it is valid, under the laws of this State, whether oral or in writing, and valid against the vendee's subsequent purchasers for value, mortgagees or lien creditors for the vendee, never having title, could not give one, or encumber what he has not. (Harkness vs. Russell, 118 U. S. 663) (Benner vs. Puffer, 114 Mass. 376.)

In Blackwell vs. Walker, 5 Fed. 419, wherein was involved a verbal conditional sale, the Court held that "such sales, oral or in writing, being valid under the laws of the state wherein made (Arkansas), the creditors of and purchasers from the conditional vendee acquire no right to the property as against the vendor who has been guilty of no fraud and no laches in asserting his rights. Conditional sales were valid by the common law and their validity was not affected by the provisions of the Statute of Frauds nor are they within the recording acts of said state."

III.

While this suit in the Federal Court was primarily one to determine in whom is vested the title in and to these goods as between the Trustee and the vendor, yet the Trustee upon the trial of this

cause offered no proof or testimony whatsoever showing his right to these goods, but strictly and religiously confined himself to the proposition that there had already been a determination of the merits in controversy before the Referee, who had duly and regularly passed upon the vendor's claim, in favor of the Trustee. The learned Court below decided that the proof offered was insufficient to warrant his holding that there had been a prior adjudication of this matter.

We feel that it is needless and unnecessary to make a lengthy argument so far as this phase of the controversy is concerned, for the testimony is clear that the usual and regular method of presenting claims and reclamation petitions in Courts of Bankruptcy was not followed in this instance, but to the contrary, the evidence is conclusive of the intention of the vendor not to file any such claim or petition, and that therefore there could not have been any such adjudication of the merits, as to render it res adjudicata.

It is conceded that no written petition for reclamation was filed, although the bankruptcy procedure requires such petition to be duly verified and properly filed. There was no issue raised by answer of the Trustee, as is required, nor was any regular hearing had thereon, nor was any order or judgment entered by the referee upon the merits. There were none of these essential steps in procedure followed by the claimant, and

yet the Trustee claims there had been a formal adjudication! There could not be anything before the Referee until a claimant confers jurisdiction upon him by voluntarily submitting himself before him, by filing a verified reclamation petition. And this was not done. The fact that the vendor made known his claim, upon repeated requests so to do, does not mean that he intended to prosecute or insist upon the compliance of his contention, and he could only do so in the usual and regular manner by filing a verified petition.

A claimant to personalty in the possession of a trustee may either bring an original suit against the trustee or receiver in a court of bankruptcy for the recovery of the specific property claimed to be owned by him, or may file an intervening petition in the bankruptcy proceedings. An intervention of this character is sometimes called a reclamation proceeding—it is really an equitable intervention. This practice is very similar to that upon an intervening petition filed in a suit of equity. The proceeding to reclaim property is very plenary and formal in its nature. The petition must be verified. (Loveland on Bankruptcy, 4th Ed. P. 852.)

In view of the strictness of these proceedings and in the face of all the testimony, which shows the stand and position taken by the vendor very clearly and distinctly, it seems there can be no question that so far as the rights of the parties

were concerned, there could have been no determination or adjudication of the merits in controversy.

IN CONCLUSION

If there is any solemnity, gravity or impressiveness in the making of a contract between two parties, be it oral or in writing, so long as it is valid according to the laws of the State where made, this contract of conditional sale should be upheld and sustained. Here the vendee, desiring to embark upon the perilous sea of business ventures and uncertainty, as a restaurateur, a profession dependent upon the whim and caprice of ever-changing palates, and relying upon the pleasure of exacting gourmands and epicures, made overtures to the vendor for the furnishing and outfitting of his epicurean palace. Ready money there was none, but visions of enormous business and of great profits were plentiful. Credit they sought, and the vendor was ready to give credit, provided he was secured, a request which was but reasonable and proper, and readily consented to by the vendee, who had nothing material or substantial, but the aforementioned visions. It was on November 26th, 1912, that these negotiations crystallized and assumed definite shape, for it was on that day that the contract of conditional sale was entered into, and whether it be written or oral, the intentions of the parties, as expressed by Mr.

Kiernan, and which were not challenged or disproved, should in all fairness and justice, prevail. On that date it was not known exactly and precisely just how much equipment was required to properly furnish this proposed palatial establishment, so it was expressly understood and agreed that the invoices of the goods to be thereafter furnished to this vendee, were to be successively attached to and made a part of this Exhibit "A" mentioned in this contract of conditional sale; all of such goods to be included under the terms of said contract. But it was estimated at said time that the total cost thereof would be about $1500 and it was accordingly written in said instrument. The vendees in this case, however, well knew that this consideration of $1500 was merely nominal—that it did not and could not, represent the actual value of such furnishings down to the very dollar—they knew what the express agreement and stipulation was in this regard—they knew it mattered not if they bought $5000 worth of goods, so long as they were ordered by them in the furnishing and outfitting of said restaurant—that such goods would all come under the terms of this contract of conditional sale! And if such be the understanding and intention of the parties, and if such a stipulation can be lawfully entered into, and if it need not be in writing and recorded under the laws of this State, can a third party be heard to complain that in spite of this express agreement of the parties,

he has suffered damage, in some way or other, and is therefore entitled to break this solemn covenant to meet his demands for recompense? Is it fair, is it just to the vendor, who relies upon the laws of this State for the validity of these contracts of conditional sale? Is he to suffer because there are no other assets of the bankrupt to appease the rapaciousness of his angry creditors? Had this vendee seen fit to sell all of these goods, held by him under this verbal conditional sale, to a purchaser for value, and without notice, would there have been any doubt as to the transaction, where the law of this State does not require such instruments to be recorded? Not having title, he could not give one, and the conditional vendor could follow the goods even in the hands of such innocent purchaser. What greater right, then, has this Trustee, who, with all the powers lately conferred upon him, is at best a lien creditor? Are greater privileges granted unto a lien creditor that an innocent purchaser does not possess? Then, if we are to concede that it was the intention of the parties that these particular goods were covered by the contract of conditional sale; if we are convinced that there is no statute in the State of Oregon requiring conditional sales of such goods to be in writing and recorded; then we must conclude that title was at all times vested in the Meier & Frank Company, and the conditions of such contract having been broken, they are enti-

tled to the possession of such goods as against the Trustee of the Estate of the vendee.

We therefore pray that the decree of the Court below be reversed.

Respectfully submitted,

JOSEPH & HANEY,

BARNETT H. GOLDSTEIN,

Attorneys for Appellant.

In the United States Circuit Court of Appeals

For the Ninth Circuit

MEIER & FRANK COMPANY, a corporation,
Appellant,
vs.
R. L. SABIN, as Trustee in Bankruptcy of Italian Restaurant Company, a corporation,
Appellee.

BRIEF OF APPELLEE

STATEMENT OF THE CASE.

The facts in this case stated in the sequence of time in which they arose, so far as the Trustee in Bankruptcy, the appellee herein, is concerned, are as follows:

The Italian Restaurant Company was adjudicated a bankrupt, and appellee herein elected Trustee. In the endeavor to dispose of the assets the Trustee encountered an adverse claim to certain property in his

possession, namely: the furniture and fixtures which are here in controversy. After ascertaining that the property lawfully belonged to the bankrupt, and that the appellant, Meier & Frank Company, had no valid claim thereon, the property was offered for sale, but before a sale was made an opportunity was given the appellant to assert its claim. The appellant appeared before the Referee in Bankruptcy, and petitioned to reclaim the property; the Referee in Bankruptcy conducted a formal hearing, the testimony was transcribed, the contract under which appellant claims was introduced by it and a decision was made by the Referee adversely to the appellant. It is but fair to state, however, that appellant denies that the hearing before the Referee was intended to be formal or binding upon it in any manner and as evidence of this fact appellant urges that no petition for reclamation was ever filed by it. Appellee, however, to this contention answers that it was stipulated and agreed at the hearing that the petition for reclamation should be considered as filed. (See testimony of Chester G. Murphy, Referee, Transcript of Record pp. 17 and 18; and of A. E. Gebhardt, pp. 68 and 69.) Upon the decision of the Referee the Trustee offered the property for sale to the highest bidder and sold the same to one J. T. Wilson. Before the payment of the price to the Trustee by J. T. Wilson, and delivery of the property to him, Meier & Frank Company entered suit in the state court and further threatened to institute suit against any person in whose possession the property might come, for the recovery of said property. Where-

upon the Trustee filed his bill in equity in the District Court of the United States for the District of Oregon to enjoin the said Meier & Frank Company from further interfering with the property and to remove any cloud of title therefrom, asserting that the question as to the interest of Meier & Frank Company in said property had been already adjudicated before the Referee in Bankruptcy; and that further, Meier & Frank Company had no interest in said property, having no valid lien thereon. Meier & Frank Company thereupon answered said bill denying prior adjudication of its rights, and also asserting its interest in the property in question. At the trial of the cause, excluding the question of *res adjudicata*, it was maintained by the Trustee that Meier & Frank Company had no interest in the property in question for the reason,

1. That the contract was void because of indefiniteness and uncertainty; and

2. That the written contract between the parties was the measure of their rights, and the contract had been fully performed by payment of the moneys due thereunder;

3. That parol evidence could not be introduced to aid the contract, vary it, or to add thereto.

These contentions were controverted by Meier & Frank Company. The testimony and evidence offered discloses no real conflict of fact. The contract which was introduced purported to be one of conditional sale

in which title was reserved in the seller until payment, and set forth that in consideration of $1500.00 to be paid by the purchaser (Italian Restaurant Company), the seller (Meier & Frank Company) agreed to sell to said purchaser "all of the personal property described in the list hereto attached and marked 'Exhibit A' which is hereby made a part hereof," it being testified and admitted that *no list or exhibit was attached to said contract* at the time the same was executed (Transcript of Record pp. 35, 60, 61); nor was there any intention so to do (Transcript of Record p. 62); and, in fact, the parties themselves did not know what was to be purchased at that time (Transcript of Record p. 52). It was further testified on behalf of the appellant that it was not the intention of the parties to attach any particular list to this contract, but that there was to be attached thereto a list of only such goods as might be bought in furnishing and fitting up the place from time to time, and that it was the understanding and the idea of the parties that the lien of this so-called conditional contract of sale would continue indefinitely; and that the parties might have continued their trading under the contract until all except $150 for example, had been paid, and then more goods purchased, and these goods paid for and still more goods purchased and these goods and the former goods all but paid for, and so on, "running month by month and year by year," and the lien of the contract would be effective *as to all the goods purchased since its original execution,* the title to *all* of which goods appellant claimed. (Transcript of Record pp.

63, 65, 66.) During the time of the continuance of this contract Meier & Frank Company had also an open account with the parties but the balance due on the open account at the time of bankruptcy was infinitesimal. Upon this contract, it was testified at the time of bankruptcy, there had been paid practically the exact sum of $1500.00 and interest, the consideration set forth in the conditional bill of sale (Transcript of Record pp. 48, 49, 50). Under these facts, all of which were testified to by the credit manager of Meier & Frank Company, appellant, the party who conducted negotiations with the officers of the Italian Restaurant Company, the appellant, insisted that the lien of its alleged conditional bill of sale should extend to the property in question, notwithstanding the consideration set forth therein had been fully paid.

———o———

FINDING OF FACTS BY THE COURT.

The findings of fact informally stated by the Court in its oral opinion (Transcript of Record pp. 77 and 78) may be summarized and stated as follows:

I.

THAT THE PARTIES ENTERED INTO A WRITTEN CONTRACT WHEREBY MEIER & FRANK COMPANY AGREED TO SELL

CERTAIN GOODS CONDITIONALLY, THE CONSIDERATION FOR SAID SALE BEING $1500.00 AND BEING COUCHED IN THE CONTRACT FOR THE PURPOSE OF INDICATING THE REAL VALUE OF THE PURCHASE AND THE REAL CONSIDERATION AGREED UPON.

II.

THAT THE CONTRACT PURPORTED TO HAVE ATTACHED TO IT A LIST OF PROPERTY MARKED "EXHIBIT A;" THAT THE LIST WAS NOT ATTACHED TO SAID CONTRACT AT THE TIME IT WAS EXECUTED, NOR WAS IT "REALLY THE INTENTION OF THE PARTIES TO ATTACH ANY PARTICULAR LIST TO THE CONTRACT" AND THAT NO LIST HAD EVER BEEN SO ATTACHED.

III.

THAT THE CONTRACT, THEREFORE, WAS INDEFINITE AND UNCERTAIN.

IV.

THAT THE WRITTEN CONTRACT WAS EXECUTED ON NOVEMBER 26, 1913; THAT THE GOODS PURPORTING TO BE SOLD

AND TITLE RETAINED UNDER SAID CONTRACT, AS IS SHOWN BY THE ACCOUNT INTRODUCED, WERE SOLD DURING THE MONTHS OF DECEMBER, JANUARY AND FEBRUARY AGGREGATING $3200.00, AND THAT THE CONSIDERATION NAMED IN SAID CONTRACT, TO-WIT, $1500.00, HAD BEEN FULLY PAID.

———o———

DECISION OF THE COURT.

The Court duly propounded in said case the following propositions of law in regard to the said contract: (Transcript of Record, pp. 77 and 78.)

I.

THAT THE CONTRACT ITSELF WAS VOID FOR WANT OF CERTAINTY AND DEFINITENESS, BECAUSE OF THE FACT THAT IT PURPORTED TO TRANSFER CERTAIN PROPERTY "DESCRIBED IN THE LIST HERETO ATTACHED AND MARKED EXHIBIT A, WHICH IS HEREBY MADE A PART HEREOF," AND NO LIST WAS ATTACHED TO SAID CONTRACT OR MADE A PART THEREOF, NOR INTENDED THUS TO BE AT THE TIME IT WAS EXECUTED.

II.

THE WRITTEN CONTRACT, THEREFORE, BEING VOID, A VERBAL CONTRACT COULD NOT BE SET UP IN ITS PLACE, NOR COULD THE WRITTEN CONTRACT BE MADE VALID BY ADDING THERETO BY PAROL TESTIMONY, BECAUSE OF THE FACT THAT THE PARTIES HAD ATTEMPTED TO SHOW A WRITTEN CONTRACT, AND HAVING SO ATTEMPTED AND FAILED, THEY COULD NOT THEN SUBSTITUTE IN ITS PLACE A VERBAL ONE.

III.

THAT EVEN THOUGH THE WRITTEN CONTRACT BE A VALID ONE, YET THE PURCHASE PRICE AS FIXED BY THE CONTRACT HAD BEEN PAID, THE CONDITION PERFORMED, AND THE LIEN THEREBY TERMINATED.

IV.

THAT SUFFICIENT IS NOT SHOWN BY TESTIMONY OR RECORD TO DETERMINE THAT THE MATTER HAD BEEN *RES ADJUDICATA* (ALTHOUGH THE REASON FOR THIS STATEMENT IS BELIEVED TO HAVE BEEN THAT THE DECISION UPON THIS POINT WAS NOT NECESSARY TO THE DETERMINATION OF THE ISSUE).

CONTENTION OF APPELLANT.

It is difficult to extract from appellant's brief a clear and logical statement of its contentions since appellant does not formulate them therein but necessarily it must controvert the findings and decision of the trial judge, and its contentions concisely stated, appear to be that as to the trustee the contract was not invalidated by its uncertainty, but if it be, yet it may be aided by parol evidence or that the written contract may be wholly ignored and replaced by an alleged complete oral agreement; that the price reserved in the contract has not been fully paid and the alleged lien is still effective.

APPELLEE'S CONTENTION.

The decision of the District Court may be conveniently resolved into the following topics, and the discussion had under that classification:

I.

THE INDEFINITENESS AND UNCERTAINTY IN THE PROPERTY DESCRIBED IN THE CONDITIONAL BILL OF SALE INVALIDATES THE SAME.

Weeks v. Maillardet, 14 East, 568, 106 Eng. Rep. (Reprint) 729.

Barkman v. Simmons, 23 Ark. 1, 5.

Moir v. Brown, 14 Barb. (N. Y.) 39.

Dodd v. Martin, 15 Fed. 338, 341.

Belknap v. Wendell, 21 N. H. 175, 183.

Payne v. Wilson, 74 N. Y. 352.

Cass v. Gunnison, 57 Mich. 108, 115.

Gregory v. N. P. Lumbering Co., 15 Ore. 447, 452.

Lee v. Cole, 17 Ore. 559, 561.

Flanagan Bank v. Graham, 42 Ore. 403, 418.

Ayre v. Hixson, 53 Ore. 31.

In the case of *Weeks v. Maillardet,* 14 East, 568, 104 Eng. Reports (Reprint) 729, an instrument was given conveying certain mechanical pieces "as per schedule," and no schedule was at the time of the execution of the deed attached but was subsequently attached by a person acting for both parties. It was contended (as we contend here) that the omission of the schedule made the instrument inoperative because of its uncertainty and indefiniteness. Lord Ellenborough, C. J., discussing the question says:

> "The whole deed is inoperative, unless the schedule was co-existing with it, and forming a part of the obligation. Taken by itself, the deed is insensible, and has no

> object to operate upon; therefore, it is not the defendant's deed, without the schedule, which gives effect and meaning to the whole of the duties to be performed on either side. The articles assume that at the time of their execution the schedule was annexed, and if there were then no schedule, there was no deed for any sensible purpose, for no duty could be demanded on the one side, or performed on the other side without the schedule."

This case has been much quoted by subsequent cases upon the subject. The similarity to the question before the Court is too pointed to be detailed.

In the case of *Barkman v. Simmons,* 23 Ark. 1, 5, (another case particularly similar to the one at bar) certain attached property was claimed by a third person as his property under an assignment. The instrument described the property conveyed in general terms, and then as "more particularly and fully enumerated and described in the schedule hereto annexed and marked schedule 'A.'" No schedule was attached to the deed, and upon that ground the court on motion of the defendant excluded it from the consideration of the jury as evidence in the cause. The appellate court affirmed the decision of the lower court, holding that in order to ascertain what was conveyed the deed must be scrutinized, and the deed referring to a schedule "hereto annexed," the schedule must be looked to. No schedule being annexed the deed was therefore meaningless. Says the Court:

> "We cannot, for this purpose, resort to parol evidence . . . . because the deed states that the schedule was annexed, specifically describing the property assigned. It was undoubtedly the intention of the parties that a schedule should be attached to, and made a part of, the deed, at the time it was executed, and without such schedule the deed was, in contemplation of law, incomplete and therefore, inoperative and void, as against creditors at least, and *perhaps* between the parties themselves."

In *Moir v. Brown,* 14 Barb. (N. Y.) 39, property was described generally and followed by the clause "more particularly enumerated and described in the schedule hereto annexed marked 'schedule A' ", and there was no schedule annexed. The court held that the instrument of assignment was insensible without the schedule, and as against creditors did not convey the property to the assignees, and that parol evidence in relation to the schedule not annexed was inadmissible.

ANALOGOUS OREGON CASES.

There are many Oregon cases likewise upon the general proposition.

In *Gregory v. N. P. Lumbering Co.,* 15 Ore. 447, 452, a chattel mortgage was offered in evidence, conveying after-acquired property, and was objected to upon

the grounds, among others, that the description of the lumber in the mortgage was void for uncertainty, the lumber being described as "the lumber piled on said premises, being more particularly described as Block 113, City of Portland." The Court, by Thayer, J., says:

> "I do not think it was sufficiently certain to render the mortgage operative and effectual to bind any lumber unless it were shown by extrinsic proof that Lewis, *at the time the mortgage was executed* (italics ours), had lumber answering to such description."

In *Lee v. Cole,* 17 Ore. 559, 561, the mortgage was given upon the "Chronicle Plant," and was intended to cover certain fixtures, fittings, etc., to be afterwards acquired, for the use of operating a newspaper and printing establishment. The court, discussing whether the property was sufficiently described, says:

> "In order to mortgage property so as to create a lien upon it, such property must be ascertained and identified *at the time of the execution of the instrument,"* (italics ours).

and quoting Pomeroy on Equity Jurisprudence, Section 1235, the court further says:

> "In order that a lien may arise, the agreement must deal with some particular property either by identifying it or by so describing it that it can be identified. It

> must indicate with sufficient clearness an intent that the property so described or rendered capable of identification, is to be held, given, or transferred as security for the obligation,"

and the court holds that the plaintiff in this cause, who was the purchaser and who, it was claimed, took the property subject to the alleged mortgage lien, could not have known what property was to be subject to his lien, and therefore that the mortgage at least as to him, was void.

And so, in *Flanagan Bank v. Graham,* 42 Ore. 403, 418, construing a mortgage on after-acquired property, the court held that as to third parties without notice, the mortgage was void for uncertainty.

And in *Ayre v. Hixson,* 53 Ore. 31, the doctrine of the cases of *Lee v. Cole,* 17 Ore. 559, 561, and *Gregory v. N. P. Lumbering Co.,* 15 Ore. 447, 452, above quoted, is approved.

The above cases promulgate the following principles of law: Where the description of the property is entirely omitted from an instrument, the instrument is void for uncertainty, and where there is a description of

some kind covering after-acquired property but the description is not sufficiently definite to identify the same at the time the instrument is executed, and it be later identified by the parties to the instrument, it may be valid as between said parties as ***AN EQUITABLE LIEN****, but as to third parties, assuming that they are bona fide purchasers, said instrument is void and of no effect whatsoever.*

That the Trustee in Bankruptcy has all the advantages that such third persons would have is, of course, conceded. Reference, however, is made as to this effect to section 47-a of the Bankruptcy Act (1910 amendment) and in this connection, section 301 of Lord's Oregon Laws to the effect that an attachment creditor shall be deemed a purchaser in good faith and for a valuable consideration of the property attached, is also adverted to.

Section 301 of Lord's Oregon Laws, or so much thereof as is pertinent, provides as follows:

> "From the date of the attachment, until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached."

II.

THE WRITTEN INSTRUMENT BEING VOID BECAUSE OF UNCERTAINTY AS TO

THE TRUSTEE IN BANKRUPTCY, IT CAN NOT BE AIDED, OR ADDED TO, OR VARIED BY PAROL EVIDENCE.

Barkman v. Simmons, 23 Ark. 1, 5.

Moir v. Brown, 14 Barb. (N. Y.) 39.

Crooks v. Whitford, 47 Mich. 283, 291; 11 N. W. 159.

Knight v. Alexander, 42 Ore. 521, 524.

In the case of *Crooks v. Whitford,* 47 Mich. 283, 291, it was attempted to show that certain real estate which was attempted to be conveyed was the real estate in question which was purchased under a tax deed, and the court said:

> "There is nothing whatever on the face of the instrument to denote what real estate the testator had in view nor anything to incline an intention one way rather than another in search of it;" and then, "It is certain that it was not competent to resort to parol evidence to supply the absent matter. The case was not one of interpretation or construction because there was nothing on which the power could be exercised and as there was no subject matter to be construed or interpreted there was no call for extrinsic facts to aid the office of interpretation or construction."

Attention is called to the Oregon case of *Knight v. Alexander,* 42 Ore. 521, 524, which, though not directly in point (the decision being upon the question of specific performance of a contract), yet is important because the principal of law just adverted to is clearly stated. Says the court:

> *"Courts do not permit parol evidence to be given to describe the property intended to be included in the contract and then apply such descriptions to the terms thereof."*

The cases of *Barkman v. Simmons,* 23 Ark. 1, 5 and of *Moir v. Brown,* 14 Barb. 39, have already been discussed in another connection, and reference is here made to that discussion.

III.

THAT WHERE PARTIES PUT THEIR CONTRACTS IN WRITING, THE WRITING CANNOT BE IGNORED AND PAROL EVIDENCE INTRODUCED TO SHOW ANOTHER AND DIFFERENT CONTRACT IN ITS STEAD.

Lord's Oregon Laws, Section 713.

Lee v. Summers, 2 Ore. 260.

Stoddard v. Nelson, 17 Ore. 417.

Ruckman v. Imbler Lbr. Co., 42 Ore. 231.

Ramsdell v. Ramsdell (Ore.), 132 Pac. 1167.

Pithcairn v. Hiss, 125 Fed. 110 (C. C. A. 3rd Circuit).

Lord's Oregon Laws, Section 713, provides as follows:

> "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore, there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except (here follows certain exceptions outside of the issues in this cause)."

This enactment of the Oregon code is, of course, merely an affirmation of the general law of evidence, which law is ably expounded in the case of *Lee v. Summers*, 2 Ore. 260, where the court says:

> "The theory presented in the complaint and urged by appellants' counsel is that the real contract was oral and was made on the same day, but before the writing was made, and that the terms of the agreement are not those stated in the writing.
>
> "When parties, after coming to an agreement, deliberately reduce its terms to writing and attest it with their hands, the rule is, that no evidence of their contract

> can be received except the writing itself or evidence of the contents of the writing. The rule in regard to correcting imperfections and mistakes in the writing and in regard to contesting the validity of the writing, which are briefly referred to in section 682 of the code, are not in conflict with this general and fundamental principle of the law of evidence."

And so in the case of *Pithcairn v. Hiss,* 125 Fed. 110, 113, it is well stated that

> "Parol proof is excluded, not because it is lacking in evidentiary value, but because the law for some substantive reason declares that what is sought to be proved by it (being outside the writing by which the parties have undertaken to be bound) shall not be shown. Where, by statute, a writing is required either to create an obligation or to affect a result, as in the case of deeds and wills, or of contracts within the statute of frauds, it is readily understood that it is the writing alone that is to speak; but this is equally true of contracts which, by the convention of the parties, have assumed a similar form. The writing is the contractual act, of which that which is extrinsic, whether resting in parol or in other writings, forms no part."

It is confidently asserted, therefore, that the parties having entered into a written contract wherein it is agreed by the seller, in consideration of the payment of

$1500.00, to sell certain property to the purchaser, the purchaser agreeing to pay said sum of $1500.00 in installments and to insure the property in the amount of $1500.00, title to remain in said purchaser until the payment of said sum and then upon the payment thereof to vest in the purchaser, that parol evidence even though the contract had been definite and certain as to the matter alleged to be intended to be described therein, would not be permitted to be introduced to show that property in excess of $3,000.00 was intended to be conveyed therein in consideration of the payment of the sum of $3,000.00.

It is believed that more need not be stated in this connection. The statement of the contention of appellant is sufficient to repute it and it is hard to give it serious consideration.

IV.

THAT THE WRITTEN CONTRACT HAS BEEN FULLY PERFORMED, PAID AND DISCHARGED AND THAT, THEREFORE THE LIEN OF THE INSTRUMENT, IF A LIEN EVER EXISTED, HAD TERMINATED.

As to this contention also, little need be said. The trial judge who heard the evidence found in his decision of facts that such was the case. The contract specified that goods were to be delivered to the extent of $1500.00; that on payment of the sum of $1500.00, title should

vest in the purchaser; $1500.00 was paid admittedly and consequently the condition was performed and title vested absolutely in the bankrupt, and, therefore, devolved upon the Trustee.

In this connection the case of *Vanderlip v. Bishop*, 199 Fed. 420, 422 (C. C. A. 9th Circuit), may be noted. There the court lays down the rule that where there is a conflict of evidence in the court below, and the trial judge who heard the evidence and saw the witnesses made certain findings, these findings will not be disturbed unless clearly erroneous. In the case at bar there was no conflict of evidence, and the trial judge found upon his interpretation of the evidence given by the appellant that the contract had been fully performed.

See also *Thorndyke v. Alaska P. Mining Co.*, 164 Fed. 657 (C. C. A. 9th Circuit).

CASES CITED BY APPELLANT.

No mention has yet been made nor any discussion had of the cases mentioned by appellant in his Brief under "Points and Authorities" and elsewhere. Most of the propositions cited by appellant are merely propositions of elementary law concerning which no issue is taken; for instance: the abstract principles of law set forth in its brief under Points and Authorities numbers 1, 2, 3, 4, and 6. And while the legal propositions set forth in Points and Authorities numbers 5 and 7 are not

admitted, yet for the purpose of this Brief, respondent is willing, for the purposes of the argument, to admit the same.

The cases cited by appellant do not bear upon the issues in any respect. For example, numerous cases and authorities are cited to the effect that no particular form of instrument is necessary to create a conditional sale; that the federal court, in construing the validity of conditional sale will be governed by the local law of this state; that in the absence of statute, conditional sale need not be in writing nor recorded; that a Trustee in Bankruptcy takes the estate of the bankrupt clothed with rights and remedies and powers of a lien creditor; that the Referee in Bankruptcy cannot determine rights to property claimed adversely without the voluntary submission of the controversy to him for settlement by the adverse claimant. *But no authorities whatsoever are cited upon any of the questions involved in this case.* It is argued here and there that the contract was not indefinite and uncertain, but no cases or authorities are cited sustaining this contention. Likewise it is argued that though the contract was uncertain parol evidence is admissible to aid or supplant the written contract although not one case or authority is cited to that effect, but merely the statement is made that "surely there can be no question but that parol testimony is admissible." And then appellant proceeds to construct his house of cards built of parol and imaginative testimony.

The case of *Benner v. Puffer,* 114 Mass. 376, is referred to at length, but what bearing that case has upon the issues in question is not easily seen. There the contract entered into was a verbal contract of conditional sale, was proper and valid, not only as to goods in existence at the time it was made, but as to goods which were to be afterwards acquired. While the law in this case is not believed to be the law in Oregon, yet its purport is not easily seen in connection with the case at bar.

Likewise, appellant cites three New Jersey cases, namely

Collerd v. Tulley, (N. J.) 77 Atl. 1080.
Stoll v. Sibson (N. J.), 56 Atl. 710.
Cumberland National Bank v. Baker (N. J.), 40 Atl. 853.

supposedly as authority for the alleged doctrine that property may be transferred or encumbered as against third parties, though not described in the instrument of conveyance.

In the case of Cumberland National Bank v. Baker, 40 Atl. 853 (N. J.), the court specifically discusses the question of description of the property and says that the description is specific and free from doubt or confusion and really recognizes the fact that if it had not been it would not be valid as to third parties. Be that as it may, however, the law in Oregon upon the question is plain as set forth in the cases of:

Gregory v. N. P. Lumbering Co., 15 Ore. 447, 452.

Lee v. Cole, 17 Ore. 559, 561.

Flanagan Bank v. Graham, 42 Ore. 403, 418, and

Ayre v. Hixson, 53 Ore. 31.

already discussed.

The other two New Jersey cases cited by appellant are to the effect that where property is described in a mortgage sufficiently to ascertain the same, and there is also attempted to be mortgaged in the instrument, property to be afterwards acquired, which is designated sufficiently to be traced, the mortgage on the after-acquired property may be valid, and while it is doubted whether the law in Oregon is to the same effect, yet these cases have no bearing upon the contention of appellant, because the property in all of these cases is held to be sufficiently *definitely described* in order to be traced, and there is no attempt made to vary the contract by parol evidence.

The case of *Bierce v. Hutchins,* 205 U. S. 340, cited in this connection, is equally as unfavorable (if it be conceded to be in point) as the New Jersey cases cited. There it is intimated that a provision in a mortgage that it shall apply to after-acquired property "with sufficient description to ascertain the same and bring it within the mortgage when acquired" may be valid.

CERTAIN MISLEADING STATEMENTS IN APPELLANT'S BRIEF.

Counsel for appellee, before closing, feels it proper to call attention to at least two statements or insinuations contained in appellant's brief. First, that contained on page 15 in which it is stated that the failure of appellee to call Messrs. Everett and Pearson or Montrezza, officers of the bankrupt corporation to testify, was due to some sinister motive on the part of the appellee. The fact is, as may well be seen from appellant's testimony, that Montrezza knew nothing of the circumstances concerning entering into the contract, and that Messrs. Everett and Pearson were sureties for the payment of said contract (Transcript of Record, pp. 36 and 60), and necessarily both of them were adverse parties to the Trustee and stood in the same relation to the Trustee as appellant did. If any inference is to be drawn from the failure of these gentlemen to testify, the inference is derogatory to appellant and not appellee.

The other matter referred to is an excerpt from the evidence appearing on pages 17 and 18 of Appellant's Brief in which Mr. Kiernan, credit man of appellant, states in effect, that every credit man in the city of Portland selling the Italian Restaurant Company, knew that the property in this litigation was held under a lease contract from Meier & Frank Company. We append

the illuminating cross examination of this witness on this point, the omission of which from appellant's brief is significant. (Transcript, pages 58 and 59.)

"Q. You stated that some of the creditors called you up and asked you how you were selling these people?

A. Yes.

Q. What creditors called you up?

A. I remember Fleckenstein-Mayer called us up.

Q. Fleckenstein-Mayer called you up?

A. Yes, sir; I remember other creditors, but I remember Fleckenstein-Mayer because I advised him to keep out of it.

Q. Fleckenstein-Mayer is another creditor, is it not?

A. I don't remember whether it is or not. If he followed my advice he is not a creditor.

Q. What creditors called you up?

A. I remember the reporting agencies were calling up.

Q. But no other creditors who were selling these people goods called you up, did they?

A. I wouldn't say as to that, I don't know whether they were creditors or not, because I haven't seen the list of creditors; there was a great deal of calling up. Inasmuch as I was handling it I said, "Just tell them it is buying on contract, we don't know anything about it."

Q. What advice did you give Fleckenstein-Mayer?

A. To keep out of it."

It is very apparent from this testimony that there is no evidence of *any* creditors having knowledge that the goods which were in the possession of the Italian Restaurant Company and apparently belonged to them, and which necessarily were held out by them as a source of credit, were other than their unconditional property.

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In conclusion, it is earnestly maintained that the decision of the trial judge of the district court was eminently correct, and that this controversy is merely an example of many of the controversies arising in bankruptcy whereby one creditor is endeavoring to save himself financial loss at the expense of other creditors of the same class; or, to use the words of Judge Holt, approved in the case of *Ommen v. Talcott,* 188 Fed. 401, 404, the situation is illustrative of "one of the numerous schemes by which merchants have attempted to create liens on their goods which shall be unknown to their creditors, and which shall not affect their credit, but which shall be enforcible if bankruptcy occurs. They are all based on the idea of giving notice enough to satisfy the law, and not enough to inform the creditors."

The reading of the testimony must show the situation most clearly and the discussion already has assumed greater proportions than the case warrants.

Respectfully submitted,

SIDNEY TEISER,

Attorney for Appellee.